

COPYRIGHT ROYALTY TRIBUNAL

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In the matter of: :
:
6 COMPULSORY LICENSE FOR SECONDARY :
:CRT Docket No. 80-3
7 TRANSMISSIONS BY CABLE SYSTEMS; :
:
8 ROYALTY ADJUSTMENT PROCEEDING :
:
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2100 K Street, N.W.
Room 610
Washington, D.C.

Wednesday, November 12, 1980

The hearing in the above-entitled matter commenced
at 10:00 a.m., pursuant to notice,

BEFORE:

MARY LOU BURG, Chairman

THOMAS C. BRENNAN, Commissioner

DOUGLAS E. COULTER, Commissioner

CLARENCE L. JAMES, JR., Commissioner

FRANCES GARCIA, Commissioner

ORIGINAL

Accurate Reporting Co., Inc.

(202) 726-3801

1 APPEARANCES:

2
3 FRITZ ATTAWAY, Attorney-at-Law
4 Counsel for Copyright Owners

5 STUART F. FELDSTEIN, Attorney-at-Law
6 Counsel for NCTA

7 VICKIE DIVOLL, Attorney-at-Law
8 Counsel for Professional Baseball
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C O N T E N T S

| <u>WITNESS:</u> | <u>Direct</u> | <u>Cross</u> | <u>Redirect</u> | <u>Recross</u> |
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WALTER D. SAMPSON

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|----------------|---|--|----|--|
| by Mr. Attaway | 7 | | 24 | |
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| by Mr. Feldstein | | 20 | | |
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ALLEN R. COOPER

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EXHIBITS:IDENTIFIEDRECEIVED

NCTA Rebuttal Exhibit 1

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CO Exhibit R-1

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CO Exhibit R-2

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CO Exhibit R-3

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CO Exhibit R-4

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CO Exhibit R-5

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CO Exhibit R-6

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CO Exhibit R-7

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P R O C E E D I N G S

CHAIRMAN BURG: Good morning; nice to see you all again. We will proceed. Mr. Attaway, do you have a witness?

MR. ATTAWAY: I think Mr. Feldstein has a matter we would like to take care of first.

CHAIRMAN BURG: Proceed.

MR. FELDSTEIN: During the direct case that NCTA presented, there were two or three things that were stated that were going to be placed in the record. One thing in particular, which Mr. Attaway may want to refer to it, thus I think it fair we put the matter before the Tribunal at this time.

I have one copy for the record of the three FCC decisions that were referred to in the opening argument. It was asked that a copy of those be given to the Tribunal for the record.

When Mr. Young from Times-Mirror was on the stand, Mr. Attaway asked him some questions about the totally deregulated franchise systems that he had; he stated that he had 12. He answered that he did not know the information on subscribers and rates and Mr. Attaway asked for that information for the record, and Mr. Young has provided it. And I am handing it to the Tribunal.

I apologize for the fact that it is not marked. I would like it marked as NCTA Rebuttal Exhibit 1.

1 CHAIRMAN BURG: So marked.

2 (The document referred to was
3 marked for identification as
4 NCTA Rebuttal Exhibit 1.)

5 MR. ATTAWAY: As a preliminary matter, I would
6 like to acknowledge the presence of Ms. Divoll, representing
7 professional baseball, and also acknowledge the absence of
8 Fred Koenigsberg of ASCAP, who could not be here today, but
9 wanted me to state to the Tribunal that his absence should
10 not be taken as an indication of any lack of interest in this
11 proceeding. The first witness today for copyright owners --

12 CHAIRMAN BURG: He will have to be sworn first.
13 And I presume that is Mr. Sampson. .

14 MR. ATTAWAY: Yes.

15 Whereupon,

16 WALTER D. SAMPSON
17 was called as a witness and, having first been duly sworn,
18 was examined and testified as follows:

19 CHAIRMAN BURG: Before we proceed, I want to read
20 a letter into the record that is self-explanatory; it is from
21 Dorothy Schrader, General Counsel of the Copyright Office.

22 "Dear Ms. Burg:

23 "The purpose of this letter is to explain the
24 basis on which Mr. Walter Sampson, Chief of the Licensing
25 Division, Copyright Office, will appear as a witness before the

1 Copyright Royalty Tribunal during your cable royalty rate
2 proceeding. The Copyright Office would be grateful if you
3 would read this letter into the record before the examination
4 of Mr. Sampson begins. Although Mr. Sampson has nominally
5 been called as a witness by one party, the Copyright Office
6 wants all concerned to understand that Mr. Sampson appears
7 as a neutral witness merely to respond to questions regarding the
8 present practices and procedures of the Licensing Division
9 of the Copyright Office in processing the cable statements of
10 account. He will cooperate to the extent of responding to
11 questions that elicit facts regarding the present practices
12 and proceedings of the Licensing Division. He has been
13 instructed by the Copyright Office not to respond to any
14 questions that seek to probe the rationale or the legal basis
15 for the policies adopted by the Copyright Office in examining
16 statements of account, nor to respond to questions of a
17 hypothetical or speculative nature about the possible impact
18 of decisions by the Copyright Royalty Tribunal on Copyright
19 Office practices and procedures.

20 "I or a member of my staff will accompany Mr.
21 Sampson and advise him if necessary not to respond to
22 questions that depart from the stated basis of this voluntary
23 participation in the cable royalty rate proceeding.

24 "Sincerely yours, Dorothy Schrader, General
25 Counsel."

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1 Mr. David Liebowitz is here representing the
2 Copyright Office legal counsel. All right, with that, Mr.
3 Attaway, you may proceed.

4 MR. ATTAWAY: Thank you.

5 DIRECT EXAMINATION

6 BY MR. ATTAWAY:

7 Q Mr. Sampson, the case presented by NCTA in this
8 proceeding rests primarily upon a comparison of royalty
9 fees paid per cable subscriber in 1976 and in 1980. Of
10 course, no fees were actually paid in 1976, and NCTA has
11 relied upon various estimates made in 1976 to reconstruct
12 the royalties that would have been paid in 1976 had the
13 copyright law then been in effect. To estimate the 1980
14 royalty fee per subscriber, NCTA has relied upon the statements
15 of account filed with the Copyright Office by cable systems
16 for the period 1979-2. In order to judge the validity of
17 NCTA's 1980 estimated fees, it is important that the Tribunal
18 understand what information is on these statements and whether
19 it is sufficient and accurate for purposes NCTA has
20 utilized it.

21 I would like to not introduce new exhibits, but
22 distribute copies of our exhibits COX-1 and X-1(a) that we
23 had introduced previously to permit Mr. Sampson to go through
24 these statements of account and explain what information is
25 on them; and how they are processed.

1 Mr. Sampson, you now have before you statements
2 of account filed in August of 1979 by Warner Cable.

3 Excuse me. Teletron Cable TV, which is X-1, and Warner
4 Cable Corp of Dublin, which is X-1(a).

5 Would you describe the information on these
6 statements and how they were processed by the Copyright
7 Office?

8 A Well, the information -- first, let me say that
9 we examined a statements of account and royalty fees for
10 obvious errors and omissions appearing on their face.

11 Now, I don't know if I exactly follow you, how
12 far you want me to go with what is on these; in other words,
13 we can go all the way through, which would be kind of a long
14 process here.

15 Q We are primarily interested in the second page,
16 block 1 and 2.

17 A That would be space E, Statement of Account.
18 In this particular section of the statement of account, the
19 cable system gives the number of subscribers and the rate that
20 they charge on a monthly basis. In this particular case, it
21 would be monthly -- the monthly rate. To the service to the
22 first set, additional sets, the motel-hotel rate, the commer-
23 cial rate, and another rate called "Category Service of
24 Commercial Hospitality," elderly rate, and a first outlet
25 \$1.50 a month. I don't quite understand that. That is what is

1 in Block 1 and Block 2.

2 Q You just stated that one of those items you did
3 not understand; would that have caused your office to send
4 an inquiry for clarification to to the cable system, or
5 would you have just passed that by?

6 A No, we would accept it on the face of the
7 document.

8 Q Is there any information listed on this page
9 or anywhere else on this form what would indicate the amount
10 of revenues obtained from each one of these categories of
11 service?

12 A No.

13 Q In other words, there is nothing on here that
14 would indicate gross revenues obtained from second sets or
15 hotels or hotels and motels, et cetera?

16 A No.

17 Q Is there any indication on these forms as to
18 how many individual viewers might be served in the hotels,
19 motels or commercial establishments?

20 A No.

21 Q Now, turning back to page 1, in Block D, where
22 cable systems plus the communities served, does the Copyright
23 Office make any attempt to determine whether systems serving
24 continuous communities from a single head end, file as one
25 system as required by the Act?

1 A No.

2 Q You do not attempt to verify this information
3 from the records of the FCC or the fact book information?

4 A That is correct.

5 CHAIRMAN BURG: Mr. Sampson, keep your voice
6 up, please.

7 BY MR. ATTAWAY:

8 Q The next bit of information that we are interested
9 in appears in Block K, Gross Receipts. Is that the only
10 Gross Receipt amount listed on these forms? I know this
11 number is listed in other places, but is there any other
12 gross receipt amount listed on these forms?

13 A No.

14 Q Now, turning to the statement of account for
15 Warner Cable of Dublin, what is the number of first set
16 subscribers listed in Block E?

17 A 870.

18 Q And the rate per first set subscriber that is
19 listed?

20 A \$7.50 a month.

21 Q And what is the gross receipt reported by this
22 system in Block K?

23 A \$209,400.

24 Q In the testimony of Ms. Beals, she stated
25 on October 2, which is reflected on Page 66 of the transcript,
"I assume that that what the Copyright Office put in their

1 public information files is accurate."

2 On that same day, page 116 of the transcript,
3 Ms. Beals stated "I did not see specific examples that I
4 felt were so out of line with where the cable system could
5 have made an error."

6 Now, going back to this Warner statement.
7 I have divided the 870 subscribers that they listed into
8 \$209,400 of gross receipts, which they listed. I have
9 obtained a result of \$240.69 per subscriber for a 6-month
10 period. Dividing that by 6, I get \$40.11, which should
11 compare in some way with the \$7.50 first set rate listed
12 on thr form.

13 Mr. Sampson, does the Copyright Office make
14 the kind of calculation that I just made to discover whether
15 this information on the face of these forms is internally
16 consistent?

17 A No, we do not.

18 COMMISSIONER GARCIA: What did you just do?

19 MR. ATTAWAY: I took the number of first set
20 subscribers listed in Block 1, excuse me, Block E-1, on
21 Page 2 -- the 870. I divided that into the gross subscriber
22 revenues reported on page 7, Block 10.

23 COMMISSIONER GARCIA: The \$209,000?

24 And you got \$11.50?

25 MR. ATTAWAY: I got \$240.69, which could indicate

1 the revenue per subscriber for the first 6-month
2 period; and then dividing that \$240.69 by 6, I get \$40.11,
3 which should reflect the gross receipts per subscriber for that
4 system per month. And I find that there is significantly
5 different from \$7.50, the first set rate reported by the
6 system on page 2, Block E.

7 CHAIRMAN BURG: Mr. Attaway, how did you
8 factor in the additional sets?

9 MR. ATTAWAY: I did not.

10 CHAIRMAN BURG: Why?

11 MR. ATTAWAY: I have no idea of what portion of
12 the gross receipts were received from additional sets.

13 CHAIRMAN BURG: Nor I. But would that
14 not impact against?

15 MR. ATTAWAY: It would have had this information
16 been -- I won't say it is inaccurate, because I don't know.
17 But by doing the division that I did, I should have come
18 up with a number slightly over \$7.50, which would have
19 represented the revenue per subscriber including second
20 set revenue. I'm not saying that I should have gotten
21 exactly \$7.50.

22 CHAIRMAN BURG: No, I understand that.

23 MR. ATTAWAY: I would not. But it should
24 be close, I'd think. Of course, it is not close at all.

25 CHAIRMAN BURG: I am sure Mr. Feldstein might

1 clear that up at a later point.

2 MR. ATTAWAY: I suspect he will. I would like
3 to make clear that I am not introducing this evidence to
4 indicate that cable systems aren't filing purposely inaccurate
5 information and that they are trying to understate their
6 royalties. I am only using this as an illustration, that
7 the data relied upon by NCTA to estimate the 1980 royalty
8 fee per subscriber, is insufficient for that purpose.

9 BY MR. ATTAWAY:

10 Q Mr. Sampson, and before I introduce the exhibit,
11 let me lay the foundation for it.

12 In the proceeding, copyright owners have referred
13 to the phenomenon of tiering, and stated that it presents a
14 serious problem because cable systems that offer tiered
15 services will avoid copyright payments that might be otherwise
16 due. We have stated that this problem is already manifest
17 and that it will become much more serious as the tiering
18 spreads throughout the cable industry.

19 On October 2, counsel for NCTA downplayed this
20 issue, stating on page 8 of the transcript, "The allusion
21 that was made by the copyright owners by this exhibit was
22 that the fee free or reduce the price basic service. Itsnot
23 a thing being done commonly now, but it is certainly a
24 coming trend."

25 The reference to the Exhibit was to the copyright

1 owners' Exhibit 10, which listed the excerpts from
2 the Cable TV Regulation of Proposed Franchise.

3 Mr. Sampson, to demonstrate the tearing problems
4 do in fact exist now, we would like to introduce as Copyright
5 Owners' Exhibit R-1, filed from the Copyright Office, dealing
6 with Alamagordo, New Mexico; and we would like you to relate
7 what has transpired between the Copyright Office and this
8 system.

9 (The document referred to was
10 marked for identification as
11 Copyright Owners' Exhibit R-1)

12 A The licensing system examines these statements
13 of account and royalty fees for obvious errors and omissions
14 appearing on their face. In this particular file, we received
15 two statements of account from the same cable TV system,
16 on August 9, 1979; they both covered the same accounting period
17 -- January-June, 1979. They both served the same communities
18 and they both were certified and signed by the same person.

19 After we completed our examination of these
20 statements of account, we wrote the cable system, on March
21 28, 1980, and returned the statements of account, asking them
22 to submit a single statement of account and to recalculate
23 the royalty fee based on the total gross receipts and all of
24 the distant signals covered for the entire system.

25 Q Excuse me, Mr. Sampson, for the benefit of the

1 Tribunal, and the record, the two initial statements of
2 account that were filed are identified as A and B, and the
3 letter from the Copyright Office is identified as
4 C in this Exhibit.

5 Go on.

6 A The cable system responded to our correspondence
7 through their attorney along with a single combined statement
8 of account, and asked us, asked the Copyright Office,
9 requested that the Copyright Office retain the combined
10 statement of account, and the previous statements originally
11 filed in the Copyright Office files.

12 Their letter was dated June 19, 1980. On July
13 24, 1980, we wrote the cable system through their attorney,
14 on the system that statements of account were filed in the
15 Copyright Office as submitted. That is where the statements
16 of account are now. They are placed in the Licensing
17 Division Statement of Accounts file. Copyright Office.
18 As submitted.

19 Q Did the form in which the second combined
20 statement of account was filed comply with your letter of
21 March 28?

22 A Their statement of account, the combined statement
23 of account, really covered the information previously submitted
24 on the two separate statements. We asked that they submit a
25 single statement of account, which they did. We asked that

1 the royalty fee be re-calculated. The royalty fee was
2 not changed.

3 Q They did not re-calculate the royalty fee?

4 COMMISSIONER JAMES: What was his answer to that
5 question?

6 THE WITNESS: No.

7 COMMISSIONER JAMES: It was not changed?

8 BY MR. ATTAWAY:

9 Q In the section of the exhibit labeled "D"
10 there is a letter from the attorney for the cable system to
11 his client. On page 2 I would like to read a sentence from
12 that letter.

13 The attorney advises his client, "The Copyright
14 Office recognizes that it is merely a repository and not
15 an enforcement agency, and that it does not have the authority
16 to accept or reject statements of account or other filings."

17 Is that a fair description of the authority
18 of the Copyright Office? And its policy?

19 A We did not feel that these particular letter
20 that you are talking about was directed to us; we felt that
21 this letter was misaddressed, or mismailed to the Licensing
22 Division. And really we had no comment on this letter.
23 It was not addressed to the Licensing Division.

24 Q Is it correct that Copyright Office is not
25 responsible for enforcing the compliance with this statute?

1 A That's correct.

2 Q Also in this letter, the attorney, on the first
3 page, second paragraph, states that this tiering problem is
4 being encountered by many cable systems. Do you have any idea
5 of the extent of this tiering problem that has already been
6 identified by the Copyright Office?

7 A No. I do not.

8 Q You have no idea of how many systems may be
9 tiering today and filing statements of account similar to
10 the one we have introduced today?

11 A I do not.

12 MR. ATTAWAY: That is all the questions I have;
13 thank you.

14 COMMISSIONER COULTER: Mr. Sampson, you are
15 responsible for overall making sure that errors are noted
16 in the statements of account; is that correct?

17 THE WITNESS: All the obvious errors that come
18 to our attention, yes.

19 COMMISSIONER COULTER: And the cost of the
20 personnel for handling that, of course is paid by the copyright
21 owners; is that correct?

22 THE WITNESS: We deduct the operating fees,
23 reasonable operating costs from their royalty fees received
24 to offset this. Yes.

25 COMMISSIONER COULTER: Those reasonable operating

1 costs include the expense of personnel?

2 THE WITNESS: To pay the salaries of the
3 Division staff, yes.

4 COMMISSIONER COULTER: The proposal by the
5 copyright owners is that there be simply an extra mechanism
6 added to the form by which the system would compute their own
7 inflationary changes. Are you aware of that?

8 THE WITNESS: I am aware of their proposal. I
9 do not know the mechanics of the proposal.

10 COMMISSIONER COULTER: And I assume that would
11 entail additional personnel expense, as far as you are
12 concerned?

13 MR. FELDSTEIN: May I object to this? I believe
14 that that goes outside of the limits that Mr. Sampson is
15 permitted to testify. That is possible impact of decisions
16 by the Tribunal on Copyright Office practice. That may be
17 discussed at a later time.

18 COMMISSIONER COULTER: All right.

19 MR. ATTAWAY: Excuse me, Mr. Coulter. In our
20 rebuttal testimony, we will try to indicate to the Tribunal
21 what the new forms if our proposal is accepted, might look
22 like, and the difficulty of the lack thereof in terms of
23 the work of the Copyright Office in processing them.

24 We will also of course give a copy to the
25 Copyright Office, and I believe the Tribunal has already asked

1 the Copyright Office to comment on that issue.

2 COMMISSIONER COULTER: All right.

3 So as not to veer off into these realms,
4 I would like to get more understanding. All such computa-
5 tions dealing with the statements of account, verification,
6 whatever the calculations might be, would be costs in
7 your judgment borne by the copyright owners?

8 THE WITNESS: Yes, that would be a part of the
9 work load of the staff.

10 COMMISSIONER COULTER: Thank you.

11 CHAIRMAN BURG: Mr. Feldstein.

12 MR. FELDSTEIN: I would like to say that the
13 issue of how the copyright payments are calculated, based on
14 the number of signals carried and how they are packaged
15 by the cable, was brought up by Mr. Attaway previously.
16 And I entered an objection that, number one, it had nothing
17 to do with adjustments proceedings, which we are here going
18 under; and secondly that it was outside the purview of the
19 authority of the Tribunal to enter into a question of whether what
20 this cable system was doing is correct or not correct under
21 the law. I continue to believe that to be the case.

22 Secondly, I also note for the record that
23 Mr. Attaway appears to be buttressing his own case and not
24 rebutting anything I said, or did.

25 MR. ATTAWAY: Excuse me, Madam Chairman,

1 I would like to point out that in the direct case of
2 NCTA, as presented on October 2, pages 8-13, of the record,
3 specifically addressed this point. I think I am well within
4 my rights to rebut this testimony, which was given in the
5 NCTA as a direct case.

6 MR. FELDSTEIN: In that case, if I am not
7 mistaken, addressed the practice of tiering, not how the
8 fees were dealt with. Now, Mr. Sampson, Mr. Attaway has
9 shown you this package on Alamogordo.

10 CROSS EXAMINATION

11 BY MR. FELDSTEIN:

12 Q The correspondence indicates that there was a
13 dispute between the cable system and the Copyright Office,
14 as to the correct way of calculating the copyright fees; is
15 that correct?

16 A That is correct.

17 Q If the cable system is correct in its inter-
18 pretation of the law, have they on their combined form
19 calculated their copyright fees correctly?

20 MR. LEIBOWITZ: I object as to the question as
21 being hypothetical and speculative in nature.

22 MR. FELDSTEIN: Hypothetical and what?

23 MR. LEIBOWITZ: And speculative in nature.

24 CHAIRMAN BURG: Objection sustained. Re-word it,
25 if you can, Mr. Feldstein.

1 BY MR. FELDSTEIN:

2 Q Mr. Sampson, do you make an attempt in going
3 through copyright forms to check the calculations on the fee?

4 A On the royalty fee, the computation, yes.

5 Q How do you do that?

6 A Mainly running it through the tape to confirm the
7 figures given on that particular section of the statement.

8 Q Thus, if you were given the number of DSE's
9 assuming a Form 3 testimony, if you were given the number
10 of DSE's and therefore the percentage of copyright payment
11 under the fee schedule, and you also were given the block with
12 gross revenues, you could calculate this to see whether the
13 royalty fee is correct?

14 A On the face of that document.

15 Q On the face of the document.

16 Was this done in the Alamogordo case?

17 A Yes.

18 Q The way they did it, were their calculations
19 correct?

20 A The way they did it, it is correct.

21 Q Thank you. When you inspect a Form 3 which
22 has been submitted, what specific areas do you look at in
23 making the surface check to see whether the form is correct
24 and filled out?

25 A We examine all spaces on the statement of

1 account form. There are many blocks, columns as you
2 are aware of and anything that would be lacking from that,
3 the instructions would call for, that would alert us to
4 examine in that area more thoroughly.

5 Q If a cable system were to report that it had
6 50 subscribers and it were to report that it had \$500,000
7 in gross revenues, would you pick this up?

8 MR. LEIBOWITZ: Excuse me; I would have to
9 object to that question as well as being hypothetical.
10 I apologize for having to do so, but this has been the only
11 province that Mr. Sampson has been permitted to testify on
12 behalf of the Copyright Office. It has to do with the
13 present practice and proceedings.

14 COMMISSIONER JAMES: I will sustain that objection.

15 MR. FELDSTEIN: Apology is accepted.

16 COMMISSIONER JAMES: May I interrupt a minute?
17 On the last form that they filed, I don't have the Schedule
18 E in my packet; is that the combined form?

19 MR. ATTAWAY: That is the Alamogordo packet?

20 COMMISSIONER JAMES: Right. It does not have
21 Block 1 and Block 2 on the form E and F, in my packet.

22 MR. ATTAWAY: Commissioner James, we did not make
23 copies of the entire statement of account evidently. I
24 would be glad to supply you with the entire statement at
25 the end of the day. Mr. Sampson, would you mind if I gave

1 Commissioner James your copy? Is it complete?

2 THE WITNESS: No.

3 COMMISSIONER JAMES: Thank you.

4 BY MR. FELDSTEIN:

5 Q Mr. Sampson, did you look at Block 1, which
6 contains the number of subscribers?

7 A Yes.

8 Q Did you look at Block K, which contains gross
9 receipts?

10 A Yes.

11 Q Do you prepare those figures?

12 A No.

13 Q Do you simply take that gross receipts figure
14 and run your calculations?

15 A That's correct.

16 Q For what purpose do you look at Block 1?

17 A Block 1, space E, are we talking about?

18 Q Yes, E.

19 A To make sure that they have given the informa-
20 tion that they were instructed to give.

21 MR. FELDSTEIN: No further questions.

22 CHAIRMAN BURG: Mr. Attaway, redirect?

23 COMMISSIONER JAMES: Before you ask your
24 questions, may I ask a question? I think I misunderstood
25 something that he said.

THE WITNESS: They filed two separate statements

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1 of accounts. You requested him to combine them and they
2 did. Then they filed the third statement of account,
3 which supposedly combined the two previous accounts. Am I
4 correct so far?

5 THE WITNESS: We asked them to file a single
6 statement of account, recalculate the royalty fee based on
7 the total gross receipts and all of the distant signals
8 carried by the entire system.

9 MR. ATTAWAY: Commissioner James, I think I
10 understand your problem.

11 COMMISSIONER JAMES: It doesn't add up.

12 MR. ATTAWAY: It is my fault. because I did not
13 bring out all of the information I should have for the
14 witness; if I may ask a couple of questions.

15 COMMISSIONER JAMES: Please do. It is confusing.

16 REDIRECT EXAMINATION

17 BY MR. ATTAWAY:

18 Q Mr. Sampson, in the initial statements of
19 account, is it correct that the cable system filed one
20 statement, and a separate statement for each tier of
21 service it was providing?

22 A Yes.

23 Q And then --

24 A That is correct.

25 Q Then you wrote the cable system and asked them

1 to combine those tiers for the whole system and file one
2 statement of account listing the total gross revenues for
3 the entire system, all tiers on the one statement of account
4 and then re-calculate their royalties based on that one
5 combined gross receipts figure.

6 A That is correct.

7 Q Also on the total DSEs for the whole system
8 all tiers?

9 A That is correct.

10 Q One quick question to recap.

11 Am I correct in understanding that the Copyright
12 Office checks the mathematical calculations and checks
13 to make sure that all the blocks are filled out, not just
14 to make sure that the information on these forms is internally
15 consistent?

16 A That is correct; and in making the mathematical
17 computation or check, that correct information has been
18 brought over from other parts of the form.

19 MR. ATTAWAY: Thank you; that is all.

20 CHAIRMAN BURG: Thank you, Mr. Sampson. I
21 appreciate your participation.

22 Mr. Attaway, will you call your next witness?

23 MR. ATTAWAY: Yes, Madam Chairman; my next
24 witness will be Mr. Allen Cooper.

25

1 Whereupon,

2 ALLEN COOPER

3 having previously been sworn, was recalled as a witness
4 and was further examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. ATTAWAY:

7 Q Mr. Cooper, you were present during the
8 testimony presented by NCTA in their direct case; is that
9 correct?

10 A Yes, I was.

11 Q Are you familiar with the statutory provisions
12 governing this rate adjustment proceeding?

13 A I am, sir.

14 Q Did you participate in formulating the proposals
15 examined by the copyright owners in the direct case?

16 A I did, sir.

17 Q The primary witness for NCTA, in
18 her testimony on September 30, reflected on page 109 and 110
19 of the record of the transcript, suggested that the Tribunal
20 should consider a number of factors in reaching its decision.
21 These factors are inflation, change of the subscriber rate,
22 changes in the number of different signals reported by cable
23 systems, changes in revenue for cable systems, changes in
24 sets revenues, of cable systems, movement of systems of
25 higher royalty payments categories, and regulatory restraint
not only in terms of denial of rate increases but also

in terms of delays caused by the regulatory process. 27

The case presented by copyright owners contrasts to the case here, not only the first two factors, inflation and changes in basic subscriber rates, plus regulatory restraints.

Would you explain why you are considering only these factors relevant to this proceeding?

MR. LEIBOWITZ: Objection. The counsel is asking for his legal conclusion from a witness who is up here for facts and not a lawyer.

MR. ATTAWAY: May I respond?

CHAIRMAN BURG: Yes, please.

MR. ATTAWAY: I am asking the witness to describe why he made the proposals which he made that are not consistent with the proposals that NCTA and the reasons why they are not.

MR. FELDSTEIN: Insofar as the reasons are legal reasons and statutory interpretations, I maintain my objection.

MR. ATTAWAY: Madam Chairman, in the testimony presented by NCTA, they took great pains to provide sections of the statute. In fact they had a big chart showing the statute to the Tribunal. It is up to the Tribunal to explain why in their opinion their proposal was consistent with the statutory decisions.

Now, I am merely trying to establish why we

1 think our proposals are consistent with the statutory
2 provisions. It is up to the Tribunal we recognize to
3 answer questions of law.

4 CHAIRMAN BURG: I am going to overrule the
5 objection now. Let's see where this leads us.

6 MR. ATTAWAY: Thank you, Madam Chairman.

7 THE WITNESS: Mr. Attaway, as you asked me
8 earlier, if I was familiar with the background of these
9 regulations, I would like to -- of course, one of the
10 principal things we are here for is the House report
11 stated the basis for this review; and I quote from that
12 report, "to assure that the value of the royalty fees
13 paid by cable systems is not eroded by changes in the value
14 of the dollar or changes in average rates charged paying
15 subscribers."

16 In our view, the statute instructs the Tribunal
17 to adjust rates to reflect two and only two factors; national
18 monetary rate or deflation and changes in the average base
19 of rates per subscriber. The statute also permits the
20 Tribunal to consider regularly effecting regulatory
21 restraint, as an extenuating factor. And that is just
22 about it as far as the statute is concerned. We did not
23 consider the other factors including the NCTA analysis
24 because they have no relationship to the statutory directive.

25 The statute makes no references to increases in

1 the changes of number of distant signals recorded by
2 cable system or changes in second set revenues or the
3 movement of systems through national growth to higher cate-
4 gories which are the three factors used by NCTA that we
5 do not consider to be relevant in this case.

6 We felt that the correctness of our decision
7 considered only in changes in subscriber rates and regulatory
8 restraint were affirmed by the questionnaire sent out by
9 the Tribunal in May, which recites the language of the House
10 report and seeks to measure only those three factors. It
11 should be noted that the NCTA to the best of my knowledge
12 is given an opportunity to review the questionnaire before
13 it was sent out, and apparently the version that was sent
14 to the cable systems met their approval and reflects
15 their agreement that the three factors that the Tribunal
16 should consider are monetary inflation, changes in the per
17 set subscriber rates, and regulatory restraint.

18 I think that the other factors are really
19 irrelevant to this proceeding.

20 BY MR. ATTAWAY:

21 Q Mr. Cooper, NCTA produced an exhibit which
22 contains the language of the statute with respect to this
23 rate adjustment proceeding. It stated "To maintain the
24 real constant dollar level of the royalty fee per
25 subscriber which existed as of the date of the enactment

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1 of this Act."

2 Now, that is a statutory provision that both
3 copyright owners and NCTA are relying upon to support their
4 proposals which vary quite dramatically. Would you compare
5 your interpretation of this language with that interpretation
6 evidenced by the NCTA's case?

7 A Our interpretations are similar with the exception
8 of the impact of DSS of changes in the number of DSS equivalent
9 carried by a cable system. As far as we are concerned, as
10 cable systems in the DSE category that increase the number
11 of DSS, the amount of copyrighted programming that
12 they carry that the copyright obligation should increase
13 regardless of monetary inflation, regardless of any other
14 factor.

15 The NCTA in contrast feels that as cable systems
16 in the DSE category increase the number of programs that
17 they import and therefore pay more in accordance with the
18 statute somehow they are making an adjustment for monetary
19 inflation. This is to us a totally spurious argument. That
20 is essentially the only and the principal place where we
21 differ in place of our interpretation.

22 If you consider the NCTA, it assumes the
23 Congress intended cable systems could actually avoid increased
24 royalty rate adjustments such as the one we are considering
25 today, so long as they increase the number of DSS that they

1 carried. They paid more because they carry more DSs. They
2 are accommodating to the decrease in the value of money.
3 In my opinion, this proposition is totally inconsistent
4 with the purpose of this proceeding.

5 It would entitle cable systems to add DSs
6 without paying additional copyright fees.

7 MR. FELDSTEIN: Madam Chairman. I repeat my
8 objection. The entire testimony of Mr. Cooper thus far could
9 as well be given in a legal brief or a statement by counsel.
10 I'm hearing legal talk, statutory interpretations. I'm not
11 hearing a statement by a man who is trained in economics
12 and statistics rebutting the economic and statistical data
13 which NCTA submitted.

14 MR. ATTAWAY: At the risk of repeating myself,
15 Madam Chairman, Mr. Cooper is merely responding to testimony
16 presented by NCTA and explaining why he did not consider those
17 factors that NCTA has argued on the basis of this statutory
18 language, that should be considered by the Tribunal.

19 CHAIRMAN BURG: Again, Mr. Feldstein, I am going
20 to overrule and say that you will have your opportunity.
21 In other cases, we have allowed some latitude going back
22 and forth. We are doing this primarily for our own informa-
23 tion. You can get at that in your own way at another time.

24 Proceed, Mr. Attaway.

25 THE WITNESS: I would like to finish that one point

1 with a simple statement. It is my opinion Congress intended
2 that the rate adjustment be made assuming for DSE paying
3 systems a constant number of DSEs -- the same number of
4 DSEs. The change in the number of DSE could either result
5 in an increase in their royalty payments was not to be
6 considered in terms of this rate adjustment. Likewise,
7 specifically in the Act is a reference that a decrease in
8 the number of DSEs carried was not to trigger a rate adjust-
9 ment. So, I will conclude by saying it seems very clear that
10 change in the number of DSEs for the larger systems is
11 absolutely an irrelevant factor in this proceeding.

12 BY MR. ATTAWAY:

13 Q Mr. Cooper, you have described why you would not
14 take into account additional DS carriage. Why would you also
15 exclude the factor of movement of systems from lower payment
16 categories to higher payment categories?

17 A Again, I think that this is not at all relevant.
18 Congress or anyone concerned with cable in 1978 had to
19 appreciate the fact that systems would grow. Cable was in
20 its infancy and all the prospects were that it would grow.

21 In terms of each cable system increasing in the
22 number of subscribers and increased in the rates charged
23 subscribers, likewise additional systems coming into the
24 market serving larger communities and so forth. The point
25 is that the growth of a system from one that had gross

1 receipts in a small system category to an intermediate
2 system category and ultimately to a DSE category is in line with
3 the natural growth of cable and which was anticipated in
4 the Act by setting these various scales and structures of
5 small system exemptions, and ultimately the DSE paying
6 systems were the \$160,000 or more semiannual gross receipts,
7 based on 1976 dollars.

8 Again, it is an irrelevant factor. The fact that
9 systems grow and move into other categories is a
10 natural, complete morphosis and does not in my opinion have
11 anything to do with adjustments with either the monetary rates,
12 average rates charged subscribers or restraints by regulatory
13 agencies. It is totally irrelevant.

14 Q Mr. Cooper, why did you not consider the factor
15 of increases, post increases in second set revenues?

16 A I think that the principal situation is that the
17 purpose of this proceeding, as set forth in the statute, is
18 to maintain the real constant dollar level of royalty
19 payments made by cable systems.

20 The CRT has clearly indicated in its questionnaire
21 reliance on the rates charged by cable systems in October 1976
22 for residential subscribers for basic service to their first
23 set. I think that this is a totally appropriate interpretation
24 and reading of the statute. I totally agree with that.

25 The second set issue is additional revenues that

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1 cable systems can earn from the use of our programs in
2 terms of their basic revenues. There are several reasons
3 that it is not pertinent.

4 First, it is an ancillary factor which really
5 does not relate to the charge for the first set as of
6 October 1976. So, it is not pertinent from that standpoint.

7 Secondly, as far as I'm concerned, the charge for
8 the second sets are charges like other types of services which
9 are also not considered--in my opinion, should be considered
10 by the Tribunal. I have in mind revenue from converter
11 rentals which could be put in as another factor as included
12 in gross receipts, but has no relevancy such as second set
13 revenues.

14 The second sets are really a small thing. In the
15 exhibit mentioned earlier, the one we presented, X-1a, the
16 question was raised by the Tribunal with respect to the
17 exclusion of second set revenues as indicated on the report.
18 For your information, the total gross, if you will recall,
19 reported by the system was \$290,400. Second set revenues
20 using the figures in the report amount to \$1,224 in a six-
21 month period. That is 1-200 of the total gross receipts of
22 that system.

23 It has zero pertinency and zero impact upon the
24 issue that we are presenting.

25 Q Thank you, Mr. Cooper.

1 The last factor relied upon by NCTA is
2 regulatory restraint. NCTA presented several witnesses
3 that testified that this was a significant factor to be taken
4 into account by this Tribunal. In the direct case of the
5 copyright owners, we argue that this factor, although
6 relevant, had no bearing on the decision in this proceeding,
7 given the circumstances that presently exist in the cable
8 industry.

9 Would you explain why you felt that it was not
10 appropriate to consider regulatory restraint as an extenuating
11 factor in this case?

12 A We did look very carefully at the issue of regulatory
13 restraint. You will recall that we had a number of exhibits
14 that compared the rates of regulated versus non-regulated
15 systems during the periods covered by the CRT questionnaire.

16 As you will recall, we found very little difficult
17 in the rate reported by regulated systems versus non-regulated.
18 The question is, is this extenuating enough for it to be a
19 critical point in the NCTA's review? In our opinion, it is
20 not. The things that we asked you to recognize, Mr. Valenti
21 testified to this befoire that the cable industry is growing
22 rapidly. It is highly profitable. It is becoming dominated
23 by large corporate giants with huge resources.

24 The response to the questionnaire shows very
25 little difference between regulated and unregulated systems.

1 The exhibit we presented was \$7.52 for regulated systems
2 and \$7.75 for non-regulated in 1980. That is a difference
3 of three percent. That indicates that the unregulated, the
4 effect of the unregulated, at least from the CRT questionnaire,
5 was a three percent figure which I think is probably well
6 within the range of any kind of statistical variation that
7 occurs.

8 With respect to the delay factor which NCTA
9 makes a great deal of, we referenced the fact that we think
10 they are largely business decisions and judgemental things.
11 We find little consideration for it. And NCTA has testified
12 very much the same type of time lag, the one that they refer
13 to as the pre-application lag of some 13, 14 weeks at one
14 time, and the same kind of considerations have to be faced
15 by regulated and unregulated systems. There is no difference
16 between the two. You make a determination on a business
17 basis whether or not you are going to increase the rate of
18 your subscribers. That whole framework, that whole piece of
19 time lag that NCTA produced does not differentiate between
20 regulated and unregulated systems.

21 CHAIRMAN BURG: What about the last step in that?
22 Forget the time lag, the lead time. If indeed they want to
23 raise their rates and do everything they can to prepare the
24 paperwork in the case and take it to the jurisdiction that is
25 in control and that jurisdiction for one reason or another

1 says no, what is your answer to that?

2 THE WITNESS: My answer, Commissioner Burg, is
3 that if there is delay in that second stage, the gross
4 receipts of the cable system would be lower than it would
5 have been if there were no delay. Is that correct? If the
6 increase had been granted immediately to the regulated
7 system at the time it was set, the gross receipts would have
8 gone up immediately.

9 If they have not gone up because regulatory
10 delay, then the copyright royalty payments are lower than they
11 would have otherwise have been, and the copyright owners are
12 already sharing with the cable systems the cost of that delay.
13 So, to the extent that that is a factor at all, it is one that
14 is borne by the copyright owners, as well as by the cable
15 systems. Therefore, it should have relatively little weight
16 in terms of your ultimate decision.

17 CHAIRMAN BURG: I may ask that question of the
18 other side at the appropriate time.

19 BY MR. ATTAWAY:

20 Q Mr. Cooper, if delay were to be taken into
21 account, would you not have to compare the delays experienced
22 by regulated systems with those experienced by unregulated
23 systems?

24 A Yes.

25 Q Are you aware of any evidence introduced in this

1 proceeding on that point? Has that comparison been made?

2 A I'm not certain, Mr. Attaway. I can't recall
3 that it has been.

4 Q I cannot either.

5 In the opening remarks of Mr. Feldstein on
6 September 30th at page 74, he went to considerable length
7 to explain the nexus between the statutory language and the
8 proposal that he was presenting.

9 On page 74: "What is to be maintained is the
10 real constant dollar level of the royalty fee per subscriber.
11 That does not say per program, it does not say per signal. It
12 states royalty fee per subscriber as of the date of enactment
13 of that Act, October 19, 1976."

14 I believe you testified that in your opinion
15 this interpretation is not logical given your view of the
16 purpose of this proceeding. You have stated that if the NCTA
17 interpretation was to be accepted, it would have the effect
18 of allowing cable systems to add DSs without increasing the
19 real constant dollar level of the royalty fees.

20 Would you illustrate how this result might take
21 place?

22 A We are going to distribute an exhibit, R-2.

23 MR. ATTAWAY: I would like to introduce Copyright
24 Owner Exhibit R-2.

25 (Copyright Owner's Exhibit R-2 was marked for

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1 identification and received into evidence.)

2 CHAIRMAN BURG: May we take a break before we
3 get into this?

4 MR. ATTAWAY: Sure.

5 CHAIRMAN BURG: We will take a brief recess.

6 (A brief recess was taken.)
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1 CHAIRMAN BURG: Proceed.

2 BY MR. ATTAWAY:

3 Q Mr. Cooper, we now have before us Copyright
4 Owners Exhibit R-2, which we will use to illustrate how
5 cable systems might add distant signals without increasing
6 their royalty payment under the proposal advanced by NCTA
7 in this proceeding.

8 A Considering the affect on one system over three
9 periods, one is the base period, July- December 1976; second
10 is July-December '79 which is essentially the 1979 statement
11 of account period. And now, we're dealing with the future,
12 January-June 1980. We are dealing with as far as that's
13 concerned a period at which time the CRT, the Tribunal could
14 make a great adjustment, if it were so inclined.

15 The number of DSEs carried by this cable system,
16 this larger cable system were three in the 1976. And this
17 has now been increased to five DSEs. The statutory rate
18 for these DSEs is the number two line, 1.525 for three DSEs
19 and 2.150 for gross receipts for five DSEs.

20 We are assuming a monthly subscriber rate of
21 \$5. It is not relevant to this question, and gross revenue
22 per subscriber for basic service of \$32 includes an amount
23 for second sets. Five times six, plus \$2 over the period
24 for those subscribers. The royalty fee for subscriber by
25 multiplying item two by item four. It is .488 cents, 48.8 cents

lw-2

1 in 1976 and 68.8 cents for the July-December '79 and January-
2 June 1980 at five DSE level.

3 Line six indicates that the change from 48.8
4 cents to 68.8 cents is 41 percent. That's the same of course
5 in both the '79 and '80 categories. Let's assume that in
6 seven that the CPI increased over the base period of October
7 by 40 percent, and the CRT indicated that in order to correct
8 for monetary inflation rates paid by cable systems would be
9 increased by 40 percent as otherwise calculated.

10 The royalty fee per subscriber for January-June
11 1980 after the CPI adjustment would be 68.8 cents, if you
12 took into account the difference between three and five DSEs.
13 The reason it comes out the same is that the percent increase
14 in the royalty fee due to the addition of two DSEs is exactly
15 the same as the increase in the CPI over the base period.

16 In other words, we are saying that the 41 percent
17 increase in the royalty fee and the 40 percent increase in
18 the CPI cancel each other out. Therefore, no additional
19 payment is involved. In this example, which tracks the NCTA
20 Proposal, the cable system has added two full DSEs, despite
21 a 40 percent inflation rate over the same period. It has
22 no obligation to pay one additional cent in royalties.

23 It would be our total contention that the value
24 of that 68.8 has diminished by 40 percent, due to inflation
25 and there is no adjustment involved in using the NCTA Proposal.

1 Q Mr. Cooper, if this cable system had not added
2 distant signals and there was a 40 percent increase in inflation,
3 however measured during this period of time, then it would
4 appear that the Tribunal would have been obligated to
5 increase the royalty rate by 40 percent; is that correct?

6 A That's correct, sir.

7 Q So, by adding distant signals, the cable industry
8 in general can avoid any increase at all under this inflation
9 provision of the statute?

10 A That's correct. By increasing the DSEs, they've
11 increased the annual royalty payment per subscriber. To
12 the extent that this then equals, exceeds the inflation
13 rate, they are off the hook with respect to any additional
14 payment,, due to the erosion of the value of the dollar.

15 MR. ATTAWAY: Thank you.

16 Are there any questions from the Tribunal on this
17 exhibit?

18 THE WITNESS: It's very complicated. If you
19 have gotten it, I'm grateful.

20 CHAIRMAN BURG: This was not based on any
21 particular system; was it?

22 THE WITNESS: No, it is not. Obviously, the five
23 dollar subscriber fee is just there to make the arithmetic
24 easier for us. It is an absolute situation in dealing with a
25 very reasonable increase in the number of DSEs that a cable

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1 system might carry. It illustrates that the cable system
2 increasing its DSEs by two-thirds would have no obligation
3 due to the erosion of the value of the dollar if the NCTA
4 system is applied.

5 BY MR. ATTAWAY:

6 Q Mr. Cooper, if you had used industry-wide
7 figures rather than figures representing the single cable
8 system, would the result be the same? In other words, if on
9 average the industry as a whole would have increased?

10 A If you used annual royalty fee payment per
11 subscriber the figures would be the same.

12 Q Mr. Cooper, to determine the royalties that would
13 have been paid during the base year 1976, NCTA relies
14 exclusively upon estimates contained on page 91 of the
15 House Report. This is stated on page 97 of the September 30
16 transcript. These estimates were that in 1976 cable royalties
17 would approximate \$8.7 million or 81 cents per subscriber,
18 based upon an estimated 10.8 million subscribers.

19 I certainly cannot deny that these estimates
20 are in the House Report. I would stipulate that these
21 estimates were supplied to the House Committee responsible
22 for drafting this legislation, as suggested by Ms. Beales
23 in her testimony.

24 The critical question, however it seems to me, is
25 whether these estimates are correct. Thus, Commissioner James

1 asked Ms. Beales whether there is any documentation to
2 show that Congress was right in their estimation. That
3 question is reflected on page 115 of the September 30 transcript.

4 Ms. Beales stated that the CRT and NCTA are unable
5 to reconstruct what Congress could not do in 1976. Now,
6 Mr. Cooper, are you able to reconstruct what Congress could
7 not do in 1976 and what data is now available that might
8 allow you to do that?

9 A Mr. Attaway, I don't think I can reconstruct
10 precisely what they did. But, I think it's quite clear
11 that we can demonstrate that the figures used in the House
12 Report were furnished to the Congress grossly understated
13 the receipts of cable systems, and therefore, understated the
14 amount of royalties that would have been paid in 1976 if the
15 statute had been in effect.

16 Q What data might you use to demonstrate that?

17 A I think we can start with the Fact Book 1976
18 material on number of subscribers and compare it with the 1977
19 Fact Book, the similar data.

20 MR. ATTAWAY: At this point, I would like to
21 introduce Copyright Owners Exhibit R-3 which consists of
22 excerpts from the 1976 and 1977 Television Fact Book.

23 (Copyright Owners Exhibit No. R-3 was marked for
24 identification and received into evidence.)

25 THE WITNESS: There is no question but that the

1 estimates contained in the House Committee Report were based
2 upon the data in the 1976 Fact Book, since the 1977 Fact Book
3 was not published until fall of 1977. These estimates were
4 used by the Congress in 1976 in connection with their
5 consideration of the legislation.

6 BY MR. ATTAWAY:

7 Q Excuse me, Mr. Cooper. You said the fall of 1977.
8 Did you mean the fall of 1976?

9 A No. I said that the 1977 Fact Book would not
10 be available until the fall of 1977. Likewise, the only
11 Fact Book that was available in 1976 was the 1976 Fact Book,
12 which was not available until the fall of 1976.

13 CHAIRMAN BURG: You lost me.

14 THE WITNESS: The year that the Fact Book is
15 called, the 1976 Fact Book or the 1977 Fact Book are published
16 in the fall of each of those years. In other words, the 1976
17 Fact Book is published in September- October of 1976. The
18 1977 Fact Book is published in September-October of 1977.
19 So, the only one that was available in 1976, the latest
20 one that could have been available in 1976 was the 1976 Fact
21 Book.

22 CHAIRMAN BURG: That would have been published
23 shortly before the Bill was signed?

24 THE WITNESS: Just about. But, let us assume
25 from all the testimony that has been presented by NCTA that

1 the 1976 Fact Book was, in fact, used by the people who
2 compiled the estimates for the House, for the Congress. Let's
3 review what those data were.

4 The 1976 Fact Book, which is our Exhibit A, the
5 principal factor, you can look at the second line on top of
6 the page, it says: CATV State of the Industry, as of September
7 1, 1975. Below that in the fourth line from the bottom on
8 the left-hand column, you will see that the reporting dates
9 for those systems are mid-March 1975, and the foregoing total
10 is as of that date.

11 The data that were in the 1976 Fact Book were
12 1975 data for the most part with respect to the number of
13 subscribers and the 1975 data with respect to the rates
14 charged subscribers, and 1975 data with respect to the
15 stations carried by the cable systems as part of their basic
16 service.

17 It is true a year later, the 1977 Fact Book
18 which is our Exhibit R-3b, they are now dealing with
19 presumably the state of the cable industry as of September 1976,
20 which corresponds to the date of the Act. These are the
21 figures that presumably would have been more pertinent and
22 more correct to use in terms of setting a benchmark for the
23 increase in royalty payments by cable systems from 1976 to
24 the current date, and also with respect to anything that you
25 wanted to deal with in terms of a change from the date of

1 enactment of the statute until the current time.

2 As you will see, the R-3b indicates that the
3 state of the industry as of September 1, 1976, and also I
4 was going to look for the average time of the data. The
5 reporting dates for most systems are mid-summer 1976. This
6 appears in the first paragraph on the top of the right-hand
7 column -- mid-summer 1976.

8 The 1977 Fact Book which was not available at
9 all to the people who made these estimates was really the
10 pertinent one for them to have used if it were available to
11 make these estimates for the rates and the royalty payments
12 that would have been paid in 1976.

13 Another factor that is interesting that shows the
14 out of dateness of the material used by the people who presented
15 these estimates to Congress appears in the House Committee
16 Report. It says that: "An addition to an installation
17 charge, the subscribers pay a monthly charge for the basic
18 service averaging about \$6." The survey that the CRT conducted
19 which asked for the rates as of October 1976 indicated according
20 to our calculation an average per subscriber rate for
21 residential service of \$6.60. NCTA is \$6.48 from the same
22 source.

23 This is information the House furnished that is
24 1976 purportedly. But, in 1975, the rate was \$6. Factor
25 changes like that into the equation and you will see the 1976

1 estimate was inaccurate and understated and should not be
2 relied upon to review changes between 1976 and the current
3 time.

4 BY MR. ATTAWAY:

5 Q Mr. Cooper, had NCTA used the 1977 edition of
6 the Fact Book to make the calculations which were reflected
7 on the chart that they introduced which you say would have
8 more accurately reflected the state of the industry in 1976,
9 how would NCTA's royalty fee per subscriber analysis have
10 been changed?

11 To illustrate that change or permit Mr. Cooper
12 to illustrate that change, I would introduce Copyright
13 Owner Exhibit R-4.

14 (Copyright Owner's Exhibit No. R-4 was marked
15 for identification and received into evidence.)

16 THE WITNESS: Our Exhibit R-4 draws
17 entirely from the testimony adduced during the first phase
18 of this hearing to a substantial degree were NCTA and
19 Copyright Owners produced data that was somewhat difficult,
20 we have used the NCTA data rather than the Copyright Owner's
21 data.

22 R-4 says NCTA underestimated 1976 royalty
23 payments per subscriber by DSE systems by 14 percent due to
24 incorrect or out of date assumptions. The page one, the first
25 item is the total rate fees payable in 1976 by DSE systems.

lw-10

1 This was 7,444,000 from NCTA Exhibit 3-B in this proceeding.
2 The average distant signal equivalent in 1976, according
3 to NCTA, the transcript of October 2nd, was 2.5. The statutory
4 rate for 2.5 DSEs is .013125 gross receipts; divided by line
5 one by line two, we can compute \$567,219,000. The total
6 subscribers all systems the figure in the House Committee
7 Report was \$10,800,000.

8 NCTA estimated that DSE systems subscribers were
9 7,587,000 or five or 70.2 percent of their totals in their
10 Exhibit 3-B. We now, in line eight, compute the average DSE
11 systems subscriber total payments for basic service. I
12 emphasize the word "total".

13 Per year, we divided \$567 million by 7,586,000
14 subscribers. We have a per year subscriber payment of \$76.77.
15 Dividing that figure by 12 gives us \$6.23. This is the total
16 payment for basic service by the subscribers per the data
17 presented earlier.

18 The royalty fee per year, per DSE subscriber in 1976,
19 according to NCTA in 3-B was 98 cents. This is per year. The
20 annualized 1979-2 royalty fee per subscriber as presented
21 in their Exhibit 4-A was \$1.28. It indicated in line 11 an
22 increase in royalty fees 1979 versus 1976 of 30.6 percent.
23 This is the framework on which we will now proceed to indicate
24 that the NCTA figures underestimated the per subscriber
25 payment by 14 percent.

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1 Page two is headed NCTA Data Understates
2 Number of DSE System Subscribers as of September 1976 by
3 6.4 percent. We repeat the number of DSE system subscribers
4 in 1976 from 3-B, 7,586,000 carried over from page two. The
5 total cable system subscribers per the 1976 Fact Book which,
6 as I have already testified, indicates that it was data as of
7 September 1975 was 10,801,010. It indicates DSE subscribers
8 were 70.2 percent of the total. However, the data as of
9 September 1976 from the 1977 Fact Book indicates that the total
10 cable system subscribers were 11,500,000. Taking the 70.2
11 percent from line three, we now have 8,073,000 DSE system
12 subscribers.

13 Therefore, the understatement, the number of
14 subscribers in 1976, comparing line five with line one was
15 6.4 percent. This is purely by using 1975 subscriber data
16 instead of 1976.

17 Page three is headed NCTA data understatement total
18 DSE subscriber payments per month in 1976 by 13.9 percent.
19 We have already indicated that the NCTA data shows a
20 subscriber rate for basic service per month total of \$6.23.
21 Now, that is chart one, line eight.

22 The CRT survey rate per subscriber for first sets
23 only as compiled by the NCTA in their Exhibit Seven was
24 \$6.69. Using the data that NCTA provided in Exhibit Seven
25 and Eight, we can now convert total rate to first set rate.

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1 NCTA said that 30 percent of the subscribers pay for additional
2 sets. NCTA said the additional set rate is 20.2 percent of the
3 first set rate.

4 Therefore, if X is the total rate for basic
5 service we find X equals \$7.9½ cents. The calculations
6 are shown under line three on page three. \$7.095 is 13.9
7 percent greater than the 6.23 figure referred to in line one.
8 Page four puts these two things together.

9 We now can adjust the estimate of 1976 annual
10 royalty payment per subscriber based on the revised data.
11 The number of DSE system subscribers were 8,073,000. The
12 total rate on an annualized basis was \$85.14. Gross receipts
13 multiplying \$85 times 8073 would be 687,335,220. The royalty
14 fee, assuming the same 2.5 DSE would have been 9,021,272. The
15 royalty fee per subscriber would be \$1.12, which is 14.3 percent
16 higher than the figure used by NCTA, the royalty fee per
17 DSE system subscriber 1979 annualized, which is exactly the
18 NCTA figure. We have no way of challenging that. It was
19 \$1.28.

20 Therefore, the increase in royalty fees per
21 subscriber 1979 versus 1976 was 14.3 percent. This is a
22 reduction of 53 percent versus the NCTA's estimate of the
23 increase in the royalty fees per subscriber 1979 versus 1976.
24 If you will recall, that was 30.6 percent and was line 11 on
25 page one of this exhibit.

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1 COMMISSIONER COULTER: Mr. Cooper, you do an
2 awful lot of extrapolation from the 2.5 DSE assumption.

3 THE WITNESS: That's the only assumption I
4 have not changed, Mr. Coulter.

5 COMMISSIONER COULTER: Is there any independent
6 corroboration of these gross receipts? That is, other
7 than the figures you have extrapolated following your
8 procedure here.

9 THE WITNESS: The answer is negative. The
10 first official figures with respect to gross receipts of
11 cable systems were published by the FCC for 1977, not for
12 this period of time. The critical factor I already questioned
13 and I thought that is where you were directed, at the 2.5
14 figure. Even that estimate was an extraordinarily difficult
15 one to make.

16 The data in the Fact Book, of course, does not
17 indicate whether the signals were distant or local, whether
18 they were carried full pr part time or what have you. But,
19 we have accepted this 2.5 figure and have used it throughout.

20 The percentage for that, of course, is fixed by
21 statute.

22 BY MR. ATTAWAY:

23 Q Mr. Cooper, I think Commissioner Coulter's
24 questions touches upon a very important point. Had you or
25 NCTA or anyone else used the '77 Fact Book, in your professional

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1 opinion, could you or anyone else have extracted a meaningful
2 estimate of DSEs carried by cable systems from the information
3 contained in the Fact Book of whatever year?

4 A No, you could not. I think that we testified
5 in the first part of this proceeding that for 1978-1, the first
6 period during which cable systems filed statements of account,
7 that 41.5 percent of the cable systems, the form three
8 cable systems, carried at least one DS on a part-time basis.
9 That would have a tremendous impact upon any estimation of
10 the number of DSEs. The data just were not available,
11 certainly not available in the Fact Book, and to the best of
12 my knowledge, not available from any other source in 1978 to
13 determine whether a signal was carried full time or part time.

14 Q So, you are not advocating the use of the 1977
15 Fact Book to estimate 1976 royalty fees paid per subscriber,
16 that would have been paid per subscriber. You are merely
17 saying if someone wished to use a Fact Book to do the calcula-
18 tion, the '77 edition would have revealed a more accurate
19 answer than the '78 edition?

20 A Without question. I think that those of us
21 who have worked with the Fact Book find that to a
22 substantial degree the data with respect to the number of
23 cable system subscribers are reasonably accurate in the
24 Fact Book, provided, however, that you look at the rate date.
25 You determine what date those data were furnished to the

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1 cable system. We do not want to impugn the efforts made
2 by the publishers of the Fact Book to turn out the most
3 accurate thing that they can. They are dependent upon the
4 cooperation of cable systems to give them up to date information.

5 As we have determined in the -- I was going to
6 bring up Honolulu County. That is probably a mistake
7 on my part--since I have stated, I shall do so. I have been
8 in touch with the Fact Book people with respect to the
9 response received in Honolulu County for the 1980 Fact Book.

10 The procedure is to send them a print-out in the
11 previous years Fact Book and ask them to indicate changes.
12 Where in the area of rate, the rate per subscriber, the
13 Honolulu County people put a dash, which could have meant
14 anything. The Fact Book people are very apologetic. They
15 say when they come across a situation like this for the 48
16 continental states, they can call the system. But, they
17 do not call the system in Alaska or Hawaii to confirm the
18 data that they have. But, they do a good job and they try
19 very hard to present the material as accurately as they have.
20 But, they are dependent upon the information they receive
21 from cable systems.

22 MR. ATTAWAY: Thank you. Are there any more
23 questions from the Tribunal?

24 COMMISSIONER GARCIA: Mr. Cooper, on page two, how
25 did you come up with item number two?

1 THE WITNESS: It is a figure that is in, I hope,
2 the 1976 Fact Book listing, R-3.

3 MR. ATTAWAY: No. I think I can explain that.
4 There is a typo in this figure. It should be 10.8 million,
5 I believe. I think--

6 COMMISSIONER GARCIA: Is that the estimate of
7 the House Report?

8 MR. ATTAWAY: Right, which was taken from the
9 '76 Fact Book.

10 For the record, I have the 1976 edition of the
11 Television Fact Book. I am referring to page 73a. That
12 page shows estimated figures for total subscribers as of
13 January 1, 1976, which is 10.8 million. I believe that is
14 where the congressional estimate came from.

15 COMMISSIONER GARCIA: Then should page two
16 say data as of September 1975 instead read the January one
17 estimate or is it still the same, Mr. Attaway?

18 CHAIRMAN BURG: The earlier figure is higher
19 than the later figure.

20 MR. ATTAWAY: That's true. I cannot explain it.

21 BY MR. ATTAWAY:

22 Q Mr. Cooper, can you?

23 A Obviously, we have at least two or three figures
24 for 1978 in the Fact Book. The 10.8 million or 100--I apologize.
25 10,800,000. That is material generally used and came from

1 the 1976 Fact Book.

2 COMMISSIONER GARCIA: I don't think my question
3 was answered.

4 THE WITNESS: Whether it says September '75 or
5 January '76?

6 COMMISSIONER GARCIA: Right. I'm saying, isn't
7 the exhibit wrong by saying data as of September 1975?

8 THE WITNESS: Yes. I think if I were to use that
9 exhibit, I would probably use 10,450,000 rather than 10,800,000.

10 MR. ATTAWAY: That is correct. The exhibit
11 should have said as of January 1, 1976.

12 THE WITNESS: I think, Ms. Garcia, that these
13 figures are coming from NCTA exhibit or used by NCTA.
14 Let me check.

15 (Examining.) Exhibit 3-B of NCTA in the first
16 part of this proceeding shows the figures 7,586,050 for
17 DSE systems and 10,800,000 for all systems. Those were
18 the figures we intended to use. If there is a mistatement
19 there, it would be as of September 1975. I would have no
20 objection to it being changed to January 1, 1976, whatever
21 date you want to put on it.

22 BY MR. ATTAWAY:

23 Q Mr. Cooper, with respect to the issue of tiering
24 and specifically the testimony of Ms. Beales concerning the Chapel
25 Hill, North Carolina tiered system. Ms. Beales stated that

1w-18

1 no subscriber who is getting a free or universal service
2 can take pay unless he takes a \$7.95 package of basic
3 service. That is in the October 2nd transcript at page 13.
4 She went on to state "the technology is not advanced enough
5 so that if you take only the free tiers, the cable company
6 has the opportunity to keep you from getting the other tiers
7 if you take pay." That is at page 14 of the October 2nd
8 transcript.

9 Mr. Cooper, was Ms. Beales correct with respect
10 to the Chapel Hill system in particular and with respect
11 to the state of cable technology in general?

12 A In respect to Chapel Hill, I called
13 Village Cable Company on Monday of this week. I ascertained
14 from them that a pay TV movie service, home theater network
15 is offered to tier two subscribers. They have, as you will
16 recall first tier as a universal free service. Number two
17 is limited tier that includes additional neighborhood programs,
18 access programs, other types of services and home theater
19 network.

20 Tier three includes other pay TV services. But,
21 with respect to the statement by NCTA witness that it was
22 necessary or required that all--that the highest tier be
23 purchased before a subscriber could obtain a pay TV movie
24 service, this statement is incorrect.

25 There was another aspect of Ms. Beales' testimony

1 in connection with Chapel Hill that I think also needs to
2 be corrected. You will recall that she said something to the
3 effect that six percent of the subscribers as of June 1980,
4 the systems just started were taking the free service and
5 that this was less than the cable system had planned.

6 Their plan had called for 10 percent or assumed
7 that 10 percent of the subscribers would take the free service.
8 The reference that she made, the source of that statement
9 was given as Cable Television Regulations by Kagan Report.
10 I have reviewed that statement. With respect to the six
11 percent versus 10 percent, her interpretation was erroneous.

12 What that says is that the cable system anticipates
13 that in the future 10 percent of the subscribers would be on the
14 free tier, while there are only six percent at this time.

15 CHAIRMAN BURG: Do you have a citation for that?

16 MR. ATTAWAY: Yes, for the record.

17 BY MR. ATTAWAY:

18 Q Mr. Cooper, you were referring to page 12 of the
19 October 2nd transcript and the quote is: "42 or six percent
20 have taken only the free tier."

21 A On the top of the next page, Mr. Attaway, I
22 believe is the part with respect to planning.

23 Q That refers to the statement: "They had thought that
24 as many as ten percent of their subscribers would take the
25 free tier. And, of course, they are finding that only

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1 six percent, to date, are taking the free tier."

2 A The only reference to 10 percent is what the
3 cable systems anticipates that its level of free service
4 subscribers will be in the future rather than approve plans
5 that had not been realized.

6 Q Mr. Cooper, Mr. Addiss of Warner Amex stated
7 subscribers must take expanded basic or more expensive
8 tiers in order to buy the pay cable services. That is in
9 the October 3 transcript, page 75. Are you aware of any
10 Warner Amex system that has proposed to permit subscribers
11 to a lower priced tier to also take a pay service?

12 A Yes, Mr. Attaway.

13 Q To demonstrate that, we would like to introduce
14 Copyright Owners Exhibit R-5, which is an excerpt from a
15 summary of the Dallas franchise proposal of Warner Amex.

16 (Copyright Owner's Exhibit No. R-5 was marked
17 for identification and received into evidence.)

18 A I refer particularly to the second page of this
19 exhibit. The first paragraph on the left-hand column, it
20 indicates that at the lower level, the first tier economy
21 service--I will read the end of that sentence. "--and two
22 optional pay TV services, Family Features at \$4.95 per month
23 and Galavision at \$5.95 per month." Obviously contrary to
24 what Mr. Addiss had said, pay cable services are available
25 to subscribers at the lowest tier, at the first tier of

1 services that Warner Amex had proposed for this particular
2 system.

3 Apparently we have been advised that they have
4 been grated this franchise in Dallas. But, the statement
5 that only--that it is essential that subscribers take the
6 maximum basic tier before they can subscribe to any pay
7 cable service referenced by Ms. Beales, referenced by
8 Mr. Addiss, are incorrect with respect to that fact.

9 Q Mr. Cooper, are you familiar with NCTA's proposal
10 for dealing with the small system ceiling adjustment?

11 A Yes, I am.

12 Q Ms. Beales testified that their proposal would
13 have the affect of placing those systems who had outgrown
14 their dollar ceiling back into the limits. That is found in
15 the October 2nd transcript, page 29. In fact, would not the
16 NCTA proposal place many systems in a lower payment category
17 than they would be in had their rate kept up with inflation
18 thereby increases . In fact, would not the NCTA proposal
19 place many systems in a lower payment category than they
20 would be in had their rate kept pace with inflation by thereby
21 increasing the value of the small system ceilings to these
22 systems?

23 A Yes, it certainly would have that affect.

24 Q I assume that you can illustrate that fact?

25 A I think that we can do that with an exhibit.

1 MR. ATTAWAY: I would like to introduce
2 Copyright Owner's Exhibit R-6.

3 (Copyright Owner's Exhibit No. R-6 was marked
4 for identification and received into evidence.)

5 BY MR. ATTAWAY:

6 Q Mr. Cooper, what we have in R-6 is data based
7 primarily on exhibits produced by the NCTA in the first
8 part of this proceeding. Let us assume a hypothetical
9 system with a thousand subscribers, a small cable system in
10 1976 and then in 1980. The basic first set rate for
11 that system was 664 in '76 and 767 in 1980. These are the
12 figures for small systems that NCTA presented in their
13 Exhibit Seven, based upon the CRT Survey.

14 . The increase in the rate was testified to at
15 that time using those figures 15.5 percent to 30 percent. We
16 looked at the inflation increase in 1976-1980. We have,
17 as you know, two sets of figures to deal with. One is the
18 PCE inflation deflator, which was 15 and 30 percent level and
19 the CPI factor, the Consumer Price Index increase recommended
20 by us, would be close to 40 percent, actually 39.9.

21 The 1976 semiannual gross revenues of this cable
22 systems using the \$6.64 rate would be 43,824, being over
23 41,500, it would fill out a form two statement of account
24 and pay the rate in accordance with the form two formula.
25 The 1980 semiannual gross revenues of this system, using the

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1 same subscribers, the 767 rate would be 50,622, and it would
2 also be a form two system before any adjustment is made.

3 The NCTA proposes that their Exhibit 13, that would
4 raise the 40,000 ceiling for small cable systems, the small
5 systems exemption by the inflation ceiling. 30 percent of
6 40,000 is 52,000. This cable system with 50,622 in revenues
7 having increased by 9,000 between 1976 and 1980 now qualifies
8 as a form one system. It is less than 52,000.

9 Its royalty fee would be the statutory fee of
10 \$15. In effect, the value of the small system exemption
11 has increased as a result if the NCTA adjustment proposal
12 is used. We would like to contrast that with our proposal
13 for dealing with small systems.

14 We take the present statutory 40,000 ceiling,
15 multiply it by the rate percentage each cable system rates
16 have increased between October 1976 and the period of the
17 statement of account.

18 Now, we increase, produce a new ceiling for that
19 cable system of \$46,200. Likewise, if we were dealing with an
20 \$80,000 ceiling in the Act, we would increase that by the
21 same 15.5 percent and reach 92,400. Now, this cable system
22 that we are dealing with per year with 50,622 in revenues in
23 1980 still falls in the form two category. Its royalty fee
24 is \$253.11. The value of the small system exemption under
25 our proposal remains the same. The express purpose of the

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1 adjustment is achieved.

2 This is, of course, a very great difficulty with
3 the NCTA proposal.

4 Q Mr. Cooper, Mr. Collins of ATC indicated in
5 his testimony that there are substantial economies of scales
6 at play in the cable industry. If we have a cable system
7 and put on one more cable television customer, there is no
8 cost of the product associated with that once we spend the
9 capital, except for the copyright fee. So, incremental
10 customers on the cable system are very profitable to the
11 system. "In fact, if a customer pays us \$7 a month then it
12 is more customers than we already had. We don't have to add
13 a general manager or whatever. That one more customer, if
14 we charge him \$7 a month or \$7.50 a month, \$6 a month of that
15 is a contribution to the overall system expenses."

16 That's in the October 3rd transcript, page 26.
17 Could this factor, the economy of scale accounts, at least
18 in part to the fact that the cable industry seems to have
19 remained profitable even though average subscriber rates have
20 risen much slower than inflation since 1976?

21 A Well, with respect to your question, Mr. Attaway,
22 first, I don't know if it has remained profitable, which is
23 the word you used. I dare say that a lot of cable systems in
24 1976 were marginally profitable or operation at a loss. But,
25 they are for the most part all operating very profitably today.

1 The principal reason for that is Mr. Collin's reason. That
2 is the tremendous level range involved in the incremental
3 rate of the additional subscribers that each cable system
4 has added.

5 The average cable system began using the Fact
6 Book, but try to use the best I can, I think it is legitimate
7 to use it for this purpose, just taking the '77 Fact Book,
8 the average cable system had 3,096 subscribers in 1976.

9 In other words, taking the '77 Fact Book, and
10 giving you the 1976 number of subscribers per system which
11 is 3,098. October 1979, using the 1980 Fact Book that it
12 increased to 3,507 on the average. The economy of scale
13 involved in the addition of 500 subscribers for an average
14 system is very substantial and can be contributed very greatly
15 to profit.

16 The other thing you referenced--Mr. Collins
17 referenced, is that in addition to the leverage and profitabi-
18 lity of basic service, cable systems are much more profitable
19 today, due to the revenue received from pay cable and other
20 services.

21 Again, that involves for most cable systems a
22 moderate or no increase in engineering, lines, cable, pole
23 rentals or the other factors that are cable systems' operating
24 expenses. The increment situation is why cable systems have
25 become more profitable. Certainly, they have had no pressing

1 need to raise rates in order to become profitable.

2 Q Mr. Cooper, might this factor be considered
3 an extenuating factor to way gains, whatever weight might be
4 given to rate regulations as an extenuating factor?

5 A Certainly, the extent to which cable systems as
6 a business decision has kept their rates down. This is the
7 way they have maximized their profits, certainly is an
8 extenuating factor to be considered.

9 Unfortunately, while they have done this from the
10 standpoint of increasing the profitability of their business,
11 it may not be reflective of gross receipts from basic
12 subscription service, which is the only basis upon which
13 copyright royalty payments are made.

14 No one penny, for example, from pay cable income
15 is included in the gross receipts base on which copyright
16 payments are made.

17 CHAIRMAN BURG: Mr. Attaway, how many more questions
18 will you have of Mr. Cooper?

19 MR. ATTAWAY: I have two more questions. Then,
20 I would like to introduce the forms we would propose be
21 used to implement our proposal. That might take a bit of
22 time. If I have 15 minutes to finish with this, we could
23 introduce the forms after lunch.

24 CHAIRMAN BURG: Why don't we do the whole thing
25 after lunch? It is 12:30 now. We will come back at 2:00.

(A luncheon recess was taken.)

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1 MR. ATTAWAY: Thank you, Madam Chairman.

2 BY MR. ATTAWAY:

3 Q Mr. Cooper, you will recall that Mr. Young testified
4 that out of the 157 franchises held by Times Mirror Cable Tele-
5 vision, only 12 are truly deregulated. This is October 6th, at
6 page 9 of the transcript. These systems are listed and are the
7 exhibits introduced this morning which differs somewhat from the
8 exhibit that was given to us earlier.

9 Would you explain why this information was requested
10 initially?

11 A We asked for this listing of the deregulated or the
12 non-regulated systems in order to determine three pieces of
13 information. One was the currency and accuracy of the Factbook
14 data of these systems.

15 Two was to ascertain the difference in rates between
16 regulated and unregulated systems.

17 Three was to get a further bearing on the understate-
18 ment of the Congressional estimate of cable copyright royalties
19 that would have been paid if the Act had been in effect in 1978.

20 Q Thank you.

21 MR. ATTAWAY: I would like to introduce Copyright
22 Owner Exhibit R-7 which contains the exhibit given to us by NCTA
23 a few days ago. It differs in three respects which we will point
24 out.

25

nlw-2

1 [Whereupon, the document referred
2 to was marked for identification
3 and received in evidence as CO
4 Exhibit R-7.]

5 BY MR. ATTAWAY:

6 Q Mr. Cooper, would you describe the results?

7 First of all, would you point out the difference
8 between the exhibit as given to us several days ago that I just
9 passed out and the exhibit introduced this morning?

10 A I said three although only two are indicated on the
11 comparison of NCTA R-1 and CO-R-7. You will note that the rate
12 for R-7 for Napoleon, Ohio, actual number of subscribers as of
13 9-1-80 is 4,466. As in R-1, it is shown as 1,934. The system
14 in Uhrichsville, Ohio, on R-7, 4,490 in '80 versus 2,119 on
15 R-1.

16 The third difference, which is not reflected in these
17 data relates to a correction, if you would, that we were advised
18 by NCTA counsel; that is, in connection with the Williamsport,
19 Pennsylvania system, the figure of 10,849 subscribers as of
20 9-1-80, which appears in both CO R-7 and R-1, is not the total
21 number of subscribers of the Williamsport system but refers only
22 to a portion of those subscribers, those in metropolitan or urban
23 areas of Williamsport, these three deviations that Mr. Feldstein
24 has called to your attention and are incorporated in this exhibit.

25 Q Mr. Cooper, bearing these descriptions in mind, would

nlw-3 1 you describe the results of your examination of this exhibit?

2 A Looking first at page 1, the main thrust of page 1 of
3 R-7 is comparing the data in the TV Factbook with the data fur-
4 nished by the Times Mirror system. The columns on the left are
5 the subscribers of 9-1-80. The TV Factbook data are from the
6 1980 version.

7 The difference between those figures is indicated on
8 a percentage basis. For example, the first figure for Defiance,
9 Ohio, supplied by Times Mirror is 4,697 subscriptions in the TV
10 Factbook, a difference of 12.6 percent. You will note there are
11 pluses and minuses throughout this.

12 The Ironton, Ohio, system, apparently, the TV Factbook
13 overstates the number of subscribers as it does with Rancho Palos
14 Verdes. In another case, it understates the number excluding
15 Napoleon, Ohio. You can see the difference in Defiance and
16 Hopkinsville and so forth.

17 Looking at the next set of figures, we are dealing
18 with the rates as of October 1, 1976. This is a fundamental part
19 of the analysis. You will note the systems, the rates shown in
20 in the 1976 Factbook are lower than the actual rates as of 10-1-76
21 in seven cases with the percentage of the rate being lower. It
22 ranges from 12.5 percent in Williamsport to 28.8 percent in
23 Hopkinsville, Kentucky.

24 This confirms what we have been stressing here; that
25 is, that the 1976 Factbook provided data that were not current as

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1 of 1976. As a result, the copyright fees that would be payable
2 in '76 were understated.

3 COMMISSIONER GARCIA: Mr. Cooper, when you say "1976",
4 from your earlier testimony that would be as of September 1, 1975?

5 THE WITNESS: Not necessarily. The figures that are
6 in the Factbook for a particular system are of varying dates, but
7 these are the ones that were published in the 1976 Factbook and
8 were, therefore, the ones that were presumably used by those people
9 who made the estimation that was subsequently referred to the
10 House. They may not be for 1975. There would be varying dates
11 depending upon the system.

12 Likewise, the rates at 4-1-80 compared with the TV
13 Factbook of 1980, as I indicated earlier, the TV Factbook for
14 1980 was published in October of 1980. Again, we have substantial
15 differences between the two sets of figures. Most of them are
16 understatements of the rates that the Times Mirror says were in
17 effect April 1, 1980.

18 You will note an exception with respect to the Rancho
19 Palos Verdes system with the TV Factbook rate publishes a higher
20 rate than Times Mirror says was actually in effect as of April 1,
21 1980. The issue here is largely the reliance that can be placed
22 upon the Factbook to be the basis for making estimations of copy-
23 right payments that are due. I would like to turn to page 2 now.

24 As I indicated earlier, another reason we--

25 CHAIRMAN BURG: Excuse me, Mr. Cooper. Going to that

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1 right-hand column, where was that information gathered?

2 THE WITNESS: All of the data that NCTA R-1, except
3 for the two changes I have noted, was exactly furnished to us by
4 Times Mirror. I indicate rather interestingly more than half the
5 systems had rate increases since June of 1980, effective June of
6 1980.

7 Page two goes to one of the principal reasons we had
8 requested the data; that is, to compare the rates of regulated
9 systems versus non-regulated systems. Mr. Collins had testified
10 on October 6, 1980, and it appears on the transcript on page ten
11 that the average first set subscriber rate for the Times Mirror
12 system was \$7.26. We now have taken the rates at 4-1-80, which
13 is directly from the exhibit, the material that was furnished
14 to us by Mr. Collins and developed a weighted average subscriber
15 rate per month.

16 The rated figure is developed by multiplying, for
17 example, Defiance, 4,697 by \$7.50. That develops a figure of
18 subscribers times rates of 35,228. The total number of 1980 was
19 66,855. Following the same¹¹, we have a total subscriber times
20 rate was 501,530. Dividing 501,530 and 60 yields \$7.50 per month
21 as an average rate for Times Mirror non-regulated systems.

22 As indicated below,¹ the difference is 23 cents or
23 3.16 percent. This coincides with my previous testimony and the
24 material that we have developed in the CRT survey that indicated
25 a similar difference between the rates of regulated and unregulated

nlw-6 1 systems based upon the CRT survey. The NCTA results were similar
2 to our find.

3 Page 3 goes back to the problem of the 1976 Factbook
4 kind of thing. We took the subscribers. These are for
5 the form three systems only that we are on this list. If you
6 took the 1976 TV Factbook and took the subscriber counts from
7 it and the 1976 Factbook rates which are the things that presum-
8 ably, the very same basis data, that we used to make the esti-
9 mates that were introduced and presented to Congress, you can
10 develop a gross receipt figure for these six systems. The gross
11 receipts on that basis would be \$1,822,503.

12 Take the actual subscription rates for October, '76,
13 as provided by the Times Mirror in this exhibit particularly
14 page 1 of our exhibit. We now calculate that the gross receipts
15 of those same six systems was \$2,049,000 or a difference of 12.5
16 percent.

17 Now, this, in effect, is the actual kind of data, the
18 best we could come up with, to indicate the understatement in the
19 1976 estimates based exclusively on the difference between the
20 actual rates in effect and the Factbook rates in effect. This
21 does not take into account the question of how many subscribers
22 the system actually had in October of '76.

23 Using real numbers supplied by Times Mirror, with
24 respect to rate, I think we have confirmed the general prerequisite
25 of the document we presented earlier, our CO R-4, where we

nlw-7 1 attempted to reconstitute data from other material. I am delighted
2 that we had an opportunity to look at a part of the real world
3 as far as the rates in October, '76, and 1980, so we could develop
4 these data for you.

5 BY MR. ATTAWAY:

6 Q At the conclusion of the presentation of our direct
7 case, Commission Brennan suggested the Copyright Office be re-
8 quested to provide technical recommendations concerning impact
9 of the various proposals upon the operations of the Copyright
10 Office. This was on October 6th at page 52 in the transcript.
11 In order to assist both the Copyright Office and the Tribunal
12 in measuring the post impact of our proposals, have you prepared
13 illustrations to show how the statements have been, might be,
14 amended to implement our recommendations?

15 A We have done so.

16 MR. ATTAWAY: In order to save time, can I introduce
17 the three at the same time?

18 THE WITNESS: Let me tell the Tribunal what we have.
19 We have four pieces of material to present. One is a set of
20 blank forms that are applicable to form one, form two, and form
21 three systems.

22 Secondly, we have the hypothetical examples that we
23 used of Mr. Korn to demonstrate the workings of the formula in
24 terms of a worksheet type situation.

25 Number three, we have taken the real life examples

nlw-8 1 from the Times Mirror things that we have had discussed before
2 for one reason and one reason only. That is to use the Times
3 Mirror rates as of 10-1-76 as supplied in this material.

4 The fourth piece of information relates to the Alamo-
5 gordo system, the tiered system that was testified to earlier
6 today by Mr. Sampson. We show you how that system would have
7 been reported using these revised forms. I would suggest that
8 maybe we could look at the blank forms first, go through the
9 hypothetical systems that Mr. Korn had used. If you wish, we
10 can go through any of the other role examples or let you study
11 those at your leisure whichever you wish.

12 MR. FELDSTEIN: Madam Chairman, may I enter a prelimi-
13 nary objection to this exercise. As I understand what counsel
14 for the Copyright Owners is preparing to do is this. They
15 advance a methodology on direct. Mr. Korn was at pains to
16 explain it and to work out a number of examples. They are now
17 coming in with those same examples and a number of other simply
18 reworked into a different form.

19 I am hard pressed to understand how this fits within
20 the definition of rebutting anything that the cable industry
21 showed during its direct case. It seems to me to be a shoring
22 up or an attempt to explain what they tried to explain previously.

23 COMMISSIONER BRENNAN: Mr. Feldstein, is it NCTA's
24 position that the proposal of the joint Copyright Owners is
25 workable, that if we were to adopt the entire plan as submitted,

nlw-9

1 it can be easily implemented by cable operators.

2 MR. FELDSTEIN: Clearly that is not our position.

3 COMMISSIONER BRENNAN: Therefore, it is an issue in
4 this proceeding as to whether or not this plan is, in fact, work-
5 able.

6 MR. FELDSTEIN: That is correct, Commissioner Brennan.
7 My argument is not based on whether or not they had presented
8 the plan. They have presented the plan. They presented it
9 through Mr. Korn on the direct case.

10 My argument was that they have already presented this.
11 They are simply coming in for whatever reason to present it again.

12 COMMISSIONER BRENNAN: This body in adopting my motion
13 has manifested some concern as to the impact of this proposal
14 on the Copyright Office. I think this is a legitimate issue to
15 be pursued at this stage in the proceeding.

16 MR. ATTAWAY: Excuse me, Madam Chairman. I am trying
17 to respond.

18 I did not write the citation down, but as I recall,
19 counsel for NCTA did cross examine Mr. Korn with respect to the
20 difficulties, additive difficulties, that would be posed by our
21 recommendations.

22 MR. FELDSTEIN: I will stipulate to that question.

23 COMMISSIONER BRENNAN: To complete the record on this
24 point, in following up on the motion adopted at our last session,
25 the Chairman did write to the Copyright Office. We have been

nlw-10 1 informally advised by representatives of the Copyright Office
2 that later this month we will receive a report from the register
3 concerning the impact of this proposal on their procedures.

4 CHAIRMAN BURG: Proceed, Mr. Attaway.

5 MR. ATTAWAY: You are ruling on the objection.

6 CHAIRMAN BURG: I am overruling the objection. Yes.

7 BY MR. ATTAWAY:

8 Q Mr. Cooper.

9 A Turning to CO RA, page 1, what we propose is one page
10 that would be common to all three forms of report. The short
11 form, the intermediate form, and the long form. There are some
12 changes in here which are not a part of this proceeding. However,
13 they are a part of our recommendation that we would make to the
14 Copyright Office at some future time. That just refers to the FCC
15 physical system ID number and the identification at the top of
16 the page, Principal Community Served.

17 We had previously submitted earlier today the CO X-1
18 and -2 which indicate the standard forms which are now in place.
19 Section E is the second page of material. That is the current
20 forms that deals with cable systems indicating the data with
21 respect to subscribers, subscriber rates and receipts from other
22 types of services such as pay cable, installations, and so forth.

23 We are proposing in Section E to replace the existing
24 Section E with block one, block two and block three of this page.
25 We are concurrently recommending and it is not a part of this

nlw-11

1 proceeding that Section F on the existing forms may be dropped,
2 This is in terms of lack of pertinency with respect, in our
3 opinion, to the collection of cable copyright royalties.

4 Section E, block one of our proposal, we have made
5 a number of changes of significance. The principal one is a
6 request to the cable system to indicate in block one is gross
7 receipts in each category of subscribers for service to residen-
8 tial subscribers only.

9 First, set gross receipts and monthly rates only.
10 Also, count each subscriber household once in the highest price
11 category only. This is an effort at getting around the tiering
12 question that we have been dealing with.

13 In our opinion, the categories that we are referring
14 to are categories that differ with respect to rate. In other
15 words, if one group of subscribers had a first set basic rate of
16 \$9.95, that would be category one.

17 If another group had \$6.50, that would be category
18 two. Another may have \$2.95. That is category three. The third
19 may have less or nothing. That would be a category four group.

20 If they had a category four group at zero, that would
21 enter number of subscribers zero, rather, as many as they wish,
22 1,695 for example. Gross receipts zero and the monthly first
23 set rate zero. The total of block one have number of subscribers
24 and gross receipts would be made. The cable system would enter
25 these in line 8 of block one. So, we would know then for

nlw-12

1 this accounting period. The number of first set subscribers
2 and the gross receipts for basic service for those subscribers.

3 Number 9 would give us the average first set monthly
4 rate for this accounting period. This is developed easily by
5 dividing total gross receipts by the total number of subscribers
6 and then dividing by six. We would also enter in at line 10,
7 Section E, block one, the October 19, 1976, rate of first set
8 rate of this system.

9 If none are known, we indicated, enter 660, which
10 is fairly in agreement as the average first set subscriber rate
11 as of the date of the enactment of the law.

12 Below that we ask the cable systems to do or deter-
13 mind a percent change in the average first set monthly rate.

14 That is simply line 9 which is the current average divided by
15 line 10 which is the average as of October, 1976. This provides
16 a percentage change and the average monthly rate since the date
17 of enactment of the law.

18 Block two below that is intended to gather up the
19 balance of the gross receipts obtained by the cable system for
20 providing basic service to subscribers. Here we are dealing
21 with semi-data gross receipts from each of the categories that
22 are shown below there. One to seven are generally the types of
23 categories in which these additional gross receipts would fall.

24 Line 8 is the total of the entry of gross receipts
25 in block two. Nine brings down the total from block one and ten.

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1 Line 10 and block two is total gross receipts, block one and two,

2 Q Excuse me, Mr. Cooper. Block two is essentially the
3 same as that information called for in the present forms; is it
4 not?

5 A It is the same information requested in block, Section
6 E, blocks one and two in the existing form except that we are
7 now determining the gross receipts for each of these categories
8 of service. That information is not obtainable from the existing
9 form.

10 Block three of Section E which, again, would be a
11 part of this form that would be filled out by all cable systems
12 is the one that determines the statement of account form to be
13 used. What we have done there is to take the statutory figures
14 in line 1, the percent change in the average first set monthly
15 rate from line 10 and multiply the two. In other words, if the
16 percent change was 100, 1.10. The rate had increased by 10 per-
17 cent, currently versus October, 1976. The effect would be to
18 multiply by 41,500 by 1.10 which is the figure that is above
19 there that will give us a new small system exemption which tracks
20 the statute in terms of adjusting the small system exemption in
21 in line with the increase in the rate of the system, so no system
22 is being penalized in terms of losing its small system exemption
23 because it has increased its rate between 1976 and currently.

24 Likewise, the same thing applies to the use of the
25 percentage change times the second highest level for the

nlw-14 1 intermediate forms which is 106,00. A cable system completing
2 line 1 of block three would immediately know," as shown below,
3 whether it was subsequently filing a form one statement of account,
4 a form two statement of account or a form three statement of
5 account. That is the essence of this first page which is propos-
6 ing replacement for Section E for all cable systems.

7 It gives us the gross receipts from first subscribers.
8 It gives us the change in rate since 1976. It gives us gross
9 receipts from all other basic subscriber services and it deter-
10 mines in accordance with the statute whether the cable system
11 qualifies for the small station exemption, the intermediate
12 station payments or the long form DSE system payments.

13 Page two, this form, it is the most complicated of
14 the three. This is the adjustment we are proposing for form
15 three cable systems. Block five is the existing block file in
16 Section L, the pre-adjusted copyright royalty fee for the
17 accounting period.

18 I should explain in our proposal the cable system
19 would compute its royalty per the existing forms, per the exist-
20 ing statutory rates for its current gross. In other words, there
21 is no change in any part of the calculations up to this point --
22 in terms of determining what royalty fee for that form three
23 system would have been before any adjustment for monetary infla-
24 tion.

25 Block six is a new block. This is the surcharge to

nlw-15

1 maintain copyright fees at the October, 1976, level.

2 One, line one as we propose is that the CRT would
3 publish a constant dollar index adjustment for each accounting
4 period. We propose that this would be the consumer price index
5 change versus October, 1976. It would be a figure that would be
6 published. It would be 1.424 or 1.639 or a number of that
7 nature. It depends on what the facts would be.

8 Enter from Section E, block one, the percent change
9 in first set rate for residential service for this system. We
10 show you how that is calculated.

11 Step three is divided line one by line two to provide
12 the surcharge. That is applicable for that accounting period
13 of that form three cable system. From the result of division
14 is 1.000 or less which means that the cable system which means
15 the cable system increased its rate higher than inflation there
16 would be no surcharge.

17 COMMISSIONER JAMES: Or more?

18 THE WITNESS: The cable system would then pay the fee
19 that is computed in block five, line one above. We will work this
20 out in examples to see how that results.

21 If it is 1.000 or less, this means that the cable
22 system rates have kept up with inflation or exceeded inflation.

23 Block seven is the final computation of the adjusted
24 royalty fee. It is very simple as you can see. We take the pre-
25 adjusted copyright fee which the cable system computes exactly

nlw-16

1 as it computes it now. Enter the surcharge from block six, line
2 three which is the division of two figures, the CRT adjustment
3 figure and the individual cable system's change in basic rates
4 figure. Multiply line one by line two and you now have developed
5 the adjusted copyright royalty figure for form three cable systems
6 keeping in line to maintain the constant value of the dollar.

7 Page three deals with a much simpler system, the
8 form one system. Again, there is no major change involved.

9 Section K of the existing form, we enter the amount
10 of gross receipts from Section E, blocks one and two which would
11 be the same as the gross receipts that they are now recording.
12 We enter the percentage change and the average first set rate
13 which has been calculated. The unadjusted statutory minimum
14 rate is \$15. We multiply line one by line two to maintain the
15 constant value of that \$15. This is the total royalty fee for
16 the accounting period. That is the end of the form one calculation.
17

18 Page four deals with form two type systems. I must
19 admit to you that we have, or this may be a little more complicated
20 than either of the others because it is simplified. If
21 there is a contradiction in terms by making complications by
22 simplification.

23 I have determined that all of this form as contained
24 in the form two statement of account which involves a multiple
25 number of subtractions, multiplications, division, et cetera,

nlw-17

1 that that same formula that exists in the present form two, that
2 the calculation can be made indefinitely simpler to produce
3 exactly the same dollar figures. We have proposed this to the
4 Copyright Office in order to reduce the amount of errors and the
5 labor on the part, but the register of the copyright has not
6 accepted this formula even though it works. We have adopted it
7 in here although there is absolutely no problem in using the
8 more complicated calculations that are in the existing form two.

9 For your information, any form two system can calcu-
10 late its copyright on the present time by taking its gross
11 receipts, subtracting 41,500 from that total, multiplying the
12 balance by .01 and adding \$15.

13 Now, compare that with the formulas that are in the
14 statement of account form and you will be overwhelmed by the
15 difference.

16 To go to RA page four, again, we are dealing with
17 Section K. We have entered the amount of gross receipts from
18 the first page we dealt with.

19 In Section L, below that, we are repeating that number.
20 We are not changing figures around. We enter factor one from
21 Section E, block three, line one. That is the factor where we
22 adjusted the 41,500 by the percentage change in the average rate
23 of the system. I think it will be easier when we go to a specific
24 example.

25 We subtract line two from line one and multiply line

nlw-18 1 three by .01. The new figure, line two, we just referred to is
2 the same I was referring to by subtracting 41,500 from gross
3 receipts instead of subtracting that. You now have the adjusted
4 figure equivalent to 41,500.

5 Five, you enter the percent change in average first
6 set rate from Section E residential multiply line five by \$15
7 and add lines four and six and that gives you the total royalty
8 fee for these systems. We have now gone through the worse
9 example without any figures. I appreciate it is harder for you
10 to understand the proceeding.

11 If you would, unless you have questions you like to
12 deal with now, you might want to reserve them until we have gone
13 through our nine which are illustrations of the constant rate
14 adjustment formula using these forms on a system-by-system basis.
15 The attached illustrations, the following constants, are used.

16 The cable systems filing a statement of account for
17 the first accounting period in 1981, 5,000 subscribers. 1976
18 subscriber rate of \$6.

19 Three, DSE is a constant dollar index determined by
20 the CRT for 1981 as of 1.50.

21 BY MR. ATTAWAY:

22 Mr. Cooper, may I suggest that you begin with the illustra-
23 tion on page four which reflects more or less the situation, the
24 typical situation in the cable industry today?

25 A Okay.

nlw-19

1 Accepting Mr. Attaway's suggestion, if you turn to
2 page four, you see in block one this system had 5,000 subscribers.
3 It enters at 240,000 in gross receipts from service to resi-
4 dential subscribers first set. The monthly first set rate was
5 \$8.

6 In column, line eight, they have entered the totals,
7 500, \$240,000. So, for this accounting period below that, we
8 show the monthly first set rate was \$8. Line ten, we say the
9 rate in 1976 was \$6 for this example which is common to all of
10 them. The percent change in the average first set monthly rate
11 was 1.333 percent.

dmm-1

1 THE WITNESS: This is the hypothetical we are referring
2 to. There is no block two income. Line ten indicates the total
3 gross set for basic service by this cable system were \$240,000.

4 In block three, line one the cable system is now multi-
5 plied 1.333 times 41500. Developed 55,519. Fifty as factor one.
6 Multiply 160,000 by that same number and came up with 213,280
7 which is factor two.

8 These are limits of the small system exemptions for
9 capable systems that have increased their rates by one-third
10 since October 1976. Now since this cable system's gross sets
11 line ten are \$240,000.00 which is greater than factor two it
12 would file a form three statement of account.

13 Now the copyright fee for a cable system with \$240,000
14 in gross receipts and three DSEs \$3,660 calculated on the
15 present form exactly according to the existing formula block six
16 enters the constant dollar index adjustment of 1.5. The increase
17 in rates of 1.333 divides line one by line two to get 1.125.

18 Block 7 is the final calculation to make this adjust-
19 ment. We brought the \$3,660 dollars down and multiplied it by
20 the surcharge factor from line three block six. We ended up with
21 \$4,117.50 which is the cable system's copyright license fee ad-
22 justed for monetary inflation. Taking into account the cable
23 system's increase in rates of one-third since 1976.

24 BY MR. ATTAWAY:

25 Q Mr. Cooper, the remaining illustrations in this exhibit
correspond with those given by Mr. Korn in his testimony. They

dmm-2 1 hypothesize a system whose rates kept up with inflation, one who
2 lowered its rates and one whose rates remain the same.

3 I would leave it up to the Tribunal as to whether or
4 not you would like Mr. Cooper to go through all of these illustra-
5 tions.

6 A I would like to do one thing. Look at the first page
7 and the percentage changing type figure. That is line ten, block
8 one. On page two, we have a system that increased its rate by
9 50 percent. As a result it pays no surcharge. This is according
10 to this calculation. Page two, we have just gone through. Page
11 six type of system is one that has increased our reduced its rate.

12 That is quite a possibility. As cable systems begin to
13 introduce tiers in existing systems, economy tiers so called and
14 could reduce their rates in fact. This shows how that is taken
15 care of.

16 On page 8 we have a system whose rate encrease, rate
17 day is exactly the same as the rate in 1976 it has not changed
18 its rate at all and it pays the full surcharge.

19 CHAIRMAN BURG: Mr. Cooper, you have gotten all of
20 this material or you worked your computations in your exhibit
21 number nine predicated on this kind of a statement of account
22 if indeed the office accepted that?

23 THE WITNESS: Yes. The calculations are predicated on
24 the acceptance largely of the proposed by the copyright owners
25 with respect to the type of adjustment to make. The purpose of
these forms is to illustrate to you for a cable system,

dmm-3 1 accommodation to this procedure would be relatively easy to
2 accommodate, to handle.

3 CHAIRMAN BURG: Let me pursue that a moment and see
4 how relatively easy it would be. You are proposing this be done
5 every six months, two reporting periods a year?

6 THE WITNESS: The CRT would announce a constant dollar
7 adjustment figure for each statement of account period.

8 CHAIRMAN BURG: There are roughly 4,000 systems in the
9 country currently. It strikes me that is not all that simple
10 at all. Do you have any exemptions in this?

11 You have something that corresponds to each form
12 account now. The small, the intermediate and the larger systems.
13 What you are really saying is somebody has to go through on a
14 station by station.

15 THE WITNESS: Cable system by cable system. You have
16 to do that now. The only adjustment we are really making on
17 your part is to publish a constant dollar adjustment factor. On
18 the cable system's part to multiply, to determine the percent,
19 its current rate for first subscribers is greater than it was
20 in October '76.

21 CHAIRMAN BURG: Who did you have in mind would be
22 doing this, Commissioner Garcia?

23 THE WITNESS: No. I will tell you I am appalled at the
24 amount of paper for the form one system for their \$15 semi-
25 annually. I'm certain that the additional effort that we are
asking to be placed upon the systems is very small.

dmm-4

1 In fact, the forms, the information requested from the
2 smaller cable systems most of it is extraneous and weak eliminate
3 as far as the copyright owners are concerned without any problems.
4 I would be willing to trade of about 100 numbers for two.

5 CHAIRMAN BURG: But did you not answer my question.
6 Who would be making the calculations?

7 THE WITNESS: Each cable system would make it. The
8 calculations they are making now, Commissioner, are more compli-
9 cated than these.

10 There is nothing we are asking them to make that they
11 have not already listed. We are asking them to do the same thing.
12 They've listed the number of subscribers. We are asking them to
13 do nothing more.

14 They have to determine what or whether they follow,
15 each cable system, a form one, form two or form three statement
16 of account.

17 CHAIRMAN BURG: Who would monitor Mr. Sampson said this
18 morning that they pretty much accepts the figures on the state-
19 ment of forms they now receive. Do you perceive a monitoring
20 device?

21 THE WITNESS: The monitoring would continue to be
22 largely the responsibility of the copyright owners per the
23 statute.

24 Unfortunately, I think that U.A. Columbia lawyer is
25 probably right. To a large extent the copyright office currently
is just a repository for the funds received and does fundamental

dmm-5 1 checks only with respect to the data which are supplied by the
2 cable system. It does not do any independent outside checking
3 to determine the accuracy or inaccuracy of the materials sup-
4 plied.

5 We would ask nothing at this time under current statute
6 and the interpretation of that by the register of copyright that
7 there would be no additional chore on the part of the copyright
8 office.

9 CHAIRMAN BURG: So, there would be no additional chore
10 on the CRT and very little if any on the cable systems?

11 THE WITNESS: Yes ma'am. As far as the CRT is con-
12 cerned, having determined that in connection with this proceeding
13 that you will use a CPI index with an October 1976 figures as
14 the base, the network that is involved by the CRT for each six-
15 month period is diminimus.

16 You do one division and you have discharged your
17 responsibility with respect to maintaining the constant value
18 of the dollar for cable copyright.

19 CHAIRMAN BURG: You think the cable system operators
20 this would be an easy operation for them?

21 THE WITNESS: As I see it Madam Chairman, there is
22 nothing as complicated for them in this as filing out the
23 current forms.

24 There is so much material in the former current forms.
25 For example almost any cable system operator in the country even
if he had to pay more under this plan would rather pursue this

dmm-6 1 than fill out page after page of substitute programming listings
2 and part-time listings. Some of those returns run up to 200
3 pages just filed with this material which as far as we are con-
4 cerned would probably not be needed especially if the FCCs re-
5 cision of its DS regulations and syndicated exclusivity go into
6 effect.

7 All of those 20, 30, 40 up to 100 pages of part-time
8 substitute programming would be eliminated. I may defend myself
9 a bit. All of the information now required from cable systems
10 on these forms was requested by copyright owners.

11 Since we requested the cable systems supply that in-
12 formation, we have gone through a royalty distribution proceeding
13 and have discovered that much of that information is not useful
14 to us.

15 It is jsut more than we can absorb. So I think that
16 it is entirely likely that given an opportunity we would suggest
17 a significant simplification of these existing forms.

18 CHAIRMAN BURG: You are talking about what is in this
19 now, the copyright owners suggested or mandated.

20 MR. ATTAWAY: Right. As you observed from the respec-
21 tive cases submitted in the direct proceeding, we did not use
22 much of that information. The data is just overwhelming.

23 CHAIRMAN BURG: You have a sense of assurance now that
24 in a year's time you won't think this form or this information
25 that you are requesting is inadequate or too simple or too much
or too little?

dmm-7

1 MR. ATTAWAY: I would say if a form like this were
2 adopted, I can't imagine why it would be changed until 1985 when
3 you once again may be called upon to review the rates under the
4 statutory provision.

5 At that time, we may ask for changes or the cable
6 industry might. I don't know.

7 CHAIRMAN BURG: But you thought it through. You think
8 it can stand the test of time?

9 MR. ATTAWAY: Mr. Cooper has thought it through and
10 has assured me it will.

11 THE WITNESS: I have not assured him. We have tried
12 very hard both by keeping it general. For example in one of
13 our earlier efforts we were asking cable systems to indicate
14 what their rates were for tier, one, tier two and tier three.
15 That would have gotten us informed in the complication of the
16 names given for tiers and just what the tier involves. By
17 calling it a category and defining the category as the monthly
18 rate for the first set, I think we have simplified taht greatly.

19 We really have no, these forms are made for copyright
20 purposes. What the value is of keeping in this information such
21 as the number and cost of interconnection or installation or
22 reinstallation or other types of services which are excluded from
23 the cable copyright proceeding I think is questionable.

24 That is the kind of simplifications that we would pro-
25 pose and that are encompassed here actually.

COMMISSIONER COULTER: Obviously any additive burden

dmm-8

1 on the copyright office you would pay.

2 THE WITNESS: We are required by statute to pay that.
3 Yes. I can't visualize that this in any way increases any part
4 of the burden of the copyright office.

5 We would like actually if the copyright office would
6 somehow take on or go through a more careful scrutiny for example
7 of developing a computer file for each system that would deter-
8 mine whether a signal carried is really distant or whether it is
9 logical which could be done by computer, I think we would be
10 willing to pay some money for that for a quick check on the
11 accuracy of that count.

12 CHAIRMAN BURG: Thank you, Mr. Cooper.

13 THE WITNESS: Passing these examples, exhibit ten is
14 the real life type things we have talked about before. I must
15 say they are real live to the extent we could make real life fit
16 the form.

17 As you know it is difficult to do. The gross receipts
18 are never shown, never segregated. For any particular category or
19 type of service in the existing form.

20 So, we have tried to use the gross receipts that cable
21 system reported in all the figures in their report leave attached.
22 The basis for these calculations to each one of these exhibits.
23 So you can see. The Uhrichsville thing as I referred to earlier
24 some problems with subscribers this is a simple thing as to
25 material supplied by the cable system.

If you will notice in block E of the existing report,

dmm-9 1 it is relatively uncomplicated. Here we have a cable system
2 that had 4,395 subscribers, \$6.50 rate. We have carried these
3 figures out the best we can. I wanted to point this one out
4 for you.

5 There is an interesting thing that occurs here. While
6 the cable system sets a rate at \$6.50, the average rate per
7 subscriber for the first accounting period is shown as \$6.46
8 which is the result of that kind of a division. This is a
9 consequence of so many factors which determine what the average
10 rate was during a statement of account period.

11 Changes in the number of subscribers either in the
12 increase or decrease can effect the average. Changes in the
13 rate from the beginning of the period to the end of the period
14 can effect the average.

15 Therefore, the one rate that is currently asked for
16 in the statement of account which is the subscriber rate at the
17 end of the period does not necessarily apply in terms of the
18 average rate charged subscribers during that period.

19 That is the figure we are looking for. In this case,
20 you will know that in 1979-1 this cable system filed a form
21 three statement of account and paid \$2,188.51.

22 This now falls into form two category. This factor
23 two in block three is 188,000. The gross receipts are 119,000.
24 The payment is \$1,345 as a form two system making the adjustment
25 for inflation versus \$1,327 as a form three system without having
made such an adjustment.

dmm-10

1 This is real life drawn from the Times-Mirror material.

2 COMMISSIONER GARCIA: Mr. Cooper, I think you have
3 told me once. Frankly, I have forgotten. Why do you need the
4 block two other secondary transmission services detailed out
5 as opposed to gross?

6 THE WITNESS: I don't really need it Commissioner. If
7 you could have confidence and faith in people all I would need
8 for block one would be line 8.

9 All I would need for block two would be line 8. The
10 reason that we would ask for these additional information is
11 from the standpoint of policing.

12 We could determine if we had such data checking it
13 with on the spot investigations, published sources and so forth
14 whether these figures were reasonable or unreasonable. The other
15 examples are similar. I think I can go over them with you. I
16 think that at least my conclusion is that there is nothing being
17 asked for in terms of this form or the system that would compli-
18 cate, make life complicated for cable systems or the copyright
19 office.

20 BY MR. ATTAWAY:

21 Q Excuse me. I have one question. To illustrate or
22 compare what these new forms might look like versus the old forms.

23 Is it correct that the first sheet Section E you have
24 prepared would be a substitute for both sections E and F on the
25 existing form?

A Yes.

dmm-11

1 Q The total substitute?

2 A Yes.

3 Q The second page that you prepared, Section K and also
4 L would be new material not now required by the existing form?

5 A It adds very little to the existing form and essen-
6 tially builds from the material that is now here in terms of the
7 computation of the copyright royalty fee before adjustment.

8 That goes on just the way it has. All we have done to
9 add to it is to multiply the copyright fee, the unadjusted copy-
10 right fee by the adjustment factor, the surcharge and that is the
11 end of it.

12 That is the only change that goes in the back of
13 these forms.

14 CHAIRMAN BURG: So in effect, you would recommend to
15 the copyright office that they can scrap most --

16 THE WITNESS: We have not done that yet.

17 CHAIRMAN BURG: You are going to do it?

18 THE WITNESS: What we have done is turned a set of
19 these forms over to the copyright office, the Licensing Division.
20 They will take this under advisement.

21 Of course what they do or don't do depends on large
22 measure upon your action. With respect to other changes in the
23 form, we have previously recommended many of them to the copy-
24 right, register of copyrights.

25 Some have been acted on in terms of action taken. Many
of them have not at this time, but that may change.

dmm-12

1 COMMISSIONER JAMES: At this point in time you
2 can't give them this form until we do take action. If we
3 don't take this action there is no purpose in changing the
4 form.

5 THE WITNESS: Absolutely, Mr. James.

6 CHAIRMAN BURG: I was talking more along a hypo-
7 thetical. If you could do it, you would say you would want
8 to scrap most of this and replace it with your recommendation
9 here?

10 THE WITNESS: Right. On a interim basis all we
11 need to do in terms of updating this is simply the two pages
12 here until you get new forms presented and changed.

13 That is needed in terms of making the adjustment
14 for any form one, form two or form three system. It is
15 contained in these two pages.

16 BY MR. ATTAWAY:

17 Q Finally, Mr. Cooper, would you as quickly as possible
18 go over the Alamogordo illustration?

19 A Now this is R 11. You already have copies of the
20 three statements of account filed by this system for the first
21 semi-annual period in 1979.

22 These data are derived from that tiered system. If
23 you will know that in terms of block one we have identified
24 four categories of rates, of subscribers, based upon their
25 charges made per month for the first set. This comes from

dmm-13

1 that statement of account. So, we calculate. 7,229 subscribers.
2 In all four categories gross receipts are 31248. Doing the division
3 we get \$7.19 as the average first set monthly rate.

4 This you could absolutely not do from the existing
5 form in terms of the way it is processed and the tiering type
6 of situation and so forth.

7 We know \$6.75 I think is a hypothetical. I believe
8 that is a hypothetical for that. We have now made the division.
9 We have in block two added the other material that comes of the
10 report.

11 So we have then a total gross receipts of \$376,380 for
12 this system. This is a tiered system. We have made the other
13 calculations in the back per the existing situation.

14 Page two of this exhibit indicates that this cable
15 system should have paid \$10,539 under the existing statute and
16 under the existing rates for this accounting period. But by
17 tiering by submitting separate report forms they reduced their
18 payment to \$7,518.

19 COMMISSIONER GARCIA: Explain how they do that?

20 THE WITNESS: The way they do that, Commissioner
21 Garcia, is to separate the income they receive for tiered
22 service from the income they receive from non-tiered service.

23 So in effect they have split the system into two
24 components. They have also split the signals that are carried
25 by that system to those DSEs that are applicable to the non-
tiered service and those DSEs that are applicable to the tiered

dmm-14 1 service only.

2 According to the copyright office the appropriate
3 procedure is for them to include all their gross receipts from that
4 cable system for basic subscriber service which is what they are
5 required to do under the Act and count all of their distant
6 signals that are available to any subscribers of those systems
7 as applicable to all subscribers.

8 Instead of coming to whatever DSEs they have before,
9 they now have a DSE figure which includes those signals which
10 are available only to the tiered system subscribers.

11 They have reduced the revenue and they have reduced
12 the DSE applicable to each of the revenue classes. That is how
13 that difference comes in. But in this formula, it would not
14 work out.

15 We now have the constant dollar index which we have
16 talked about before. We have the difference in the average rates
17 between October 1976 and currently including the rates for the
18 tiered and untiered services.

19 We developed a surcharge. Multiply that by the figure
20 they should have developed from the present statute and forms to
21 develop a new copyright royalty adjusted for monetary inflation.

22 BY MR. ATTAWAY:

23 Q The \$6.75 you referred to for the October 1976 rate,
24 that is the rate listed in the '76 fact book. That is the minor
25 correction. It is not a hypothetical?

A It is subject to proof. Thank you.

dmm-15

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CHAIRMAN BURG: Is that it?

MR. ATTAWAY: I'm through.

CHAIRMAN BURG: Let's recess for five minutes.

(A five-minute recess was taken.)

etp 1

1 COMMISSIONER BRENNAN: I will temporarily pass.

2 COMMISSIONER COULTER: I would like to come back
3 to the form 2 systems, if I may. I think there is, naturally,
4 a desire in forming a system to be as simple as possible.

5 THE WITNESS: Absolutely.

6 COMMISSIONER COULTER: The cable proposed adjusting
7 ceilings at the inflation rate whatever that is. You propose
8 doing something system by system, letting them fix their
9 own rates according to how they have adjusted their sub-
10 scriber rates.

11 My question is whether the advantage to you equals,
12 is worth the complexity, and beyond that, whether there may not
13 be additional advantage to you?

14 My understanding is that a lot of your case is based
15 upon the fact that the revenues, not based upon it. I think
16 you would agree that the revenues of cable systems have or
17 would you agree that revenues of cable systems have increased
18 at a greater rate than the amount they have increased their
19 rates?

20 THE WITNESS: The total number by far, sir.

21 MR. COULTER: If you have got, if you have a second
22 form system and Uhrichsville is an exception rather than
23 typical whose subscriber rate have increased at their rate you
24 have for Uhrichsville 1.17 five percent or the ratio
25 you have set out there, and you use that ratio to establish

etp2

1 the ceiling which you have done in this case which was
2 188,000. Because according to your own rule the increase
3 in their subscriber rate is lower than the rate of inflation
4 they would actually remain as a ~~form~~ 2 system?

5 THE WITNESS: The Uhrichsville.

6 COMMISSIONER COULTER: No. Any Form 2 system
7 whose subscriber rate increase has remained less than the
8 rate of inflation would actually remain as a form 2 system?

9 THE WITNESS: That is correct.

10 COMMISSIONER COULTER: If their revenues have in-
11 creased at a rate exceeding the rate that their subscriber
12 rate has increased, they could then have revenues exceeding
13 the arate that you used as their ceiling as a form 2 system?

14 You would get no percentage on those revenues
15 according to the formula?

16 THE WITNESS: We would. If their rate had gone up
17 higher, we would, sure, in the additional income they had.
18 They would file then as a form 3 system, a DSE system and
19 pay a higher royalty rate.

20 COMMISSIONER COULTER: That violates the concept
21 I think is essential to your formula. As long as their
22 subscriber rate is less than the rate of inflation, they
23 remain as a form 2 system?

24 THE WITNESS: No. I think what we are dealing with
25 is the basic factor we have to be concerned about is assuring

etp3

etp3

1 by copyright owners. Even though it is a tiny percentage
2 of the gross receipts of cable systems derived from the
3 use of their programs. As their receipts go up under the
4 example you presented, if they go up to the extent the cable
5 system switches from a form 2 system as defined in the
6 statute to a form 3 system as defined in the statute, our
7 copyright receipts would increase.

8 COMMISSIONER COULTER: According to your formula
9 as long as the subscriber rate increases less than the rate
10 of inflation they remain a form 2 system?

11 THE WITNESS: As long as their subscriber rate in-
12 creases at a rate equal to a rate higher.

13 COMMISSIONER COULTER: Lower?

14 THE WITNESS: I believe that is true, sir. That
15 is correct.

16 COMMISSIONER COULTER: But their subscriber rate
17 increase can be less than their revenue increase. I could
18 conceive of instances where actual revenues exceed the ceiling
19 that they are at, they are at that keeps them within a form 2
20 system according to your formula.

21 Under those circumstances according to the formula
22 in the Act you would not be able to tax those excess revenues?

23 THE WITNESS: The only basis on which their gross
24 receipts would increase more would be by an increase of
25 subscribers at a lower rate. As far as their gross receipts

etp4

1 that will be the determining factor here rather than how it
2 was created in terms of whether it is a form 1, form 2 or
3 form 3 system.

4 It is a good question you are asking, but I think it
5 is encompassed within the situation we have.

6 MR. COULTER: I currently doubt it. If the rate
7 of increase in the subscriber rate is the same as the increase
8 in revenues and the trigger mechanism is
9 whether that increase is less or equal to or greater than
10 inflation, what difference does it make?

11 THE WITNESS: That is only if they get to be a form 3
12 system. The inflationary situation is not taken at all into
13 account with respect to the form 1, form 2 systems. There is
14 no surcharge situation involved in determining whether they
15 are form 1 or form 2.

16 COMMISSIONER COULTER: No. But you use the inflation
17 rate as a trigger of whether they remain a form 2 system?

18 THE WITNESS: No. I am not. I do not.

19 COMMISSIONER COULTER: Yes.

20 THE WITNESS: I do not. The only reason we use
21 in form 1 and 2 is the final adjustment in the royalty. The
22 question of whether factor 1 or 2 applies to that is absolute-
23 ly before any reference to a cost of Consumer Price Index
24 change. On page 1 of everyone of these examples in
25 Section E, there is no reference whatsoever to any change in

1 monetary rates, value. It is completely separate from mone-
2 tary value.

etp5

3 COMMISSIONER COULTER: I am talking about form 2.

4 THE WITNESS: A system to determine whether it is
5 form 1, 2 or 3, absent, before any consideration of monetary
6 inflation.

7 COMMISSIONER COULTER: But whether it remains form 2
8 is dependent upon the relationship between its rate increase
9 and the rate of inflation?

10 THE WITNESS: No. Not at all.

11 COMMISSIONER COULTER: Let me explain. According
12 to your proposal if the rate increase exceeds the rate of
13 inflation --

14 THE WITNESS: Right.

15 COMMISSIONER COULTER: -- then the ceiling would
16 place it in form 3?

17 THE WITNESS: No. Let's discuss this form a moment.
18 With Mr. Feldstein's agreement, I would like to try to
19 respond to that question. The way the Tribunal, as I
20 understand it, has to treat with small system exemptions, the
21 maintenance of the small system exemption and the maintenance
22 of the value of the copyright royalty payment to the copyright
23 owners is very different.

24 As far as the small system, your primary charge is
25 to maintain the value of the small system exemption.

etp6

etp6

1 regardless of monetary inflation, your charge with respect to
2 small systems is to maintain the value of the small system ex-
3 emption for a cable system.

4 The monetary inflation situation is a primary
5 importance with DSE systems to the extent, again, that the
6 statute relates to your making adjustments to maintain the
7 constant value of the dollar.

8 What we do with form 1, form 2 systems in this
9 situation is to increase the value of the exemption for a
10 small system in line with its increase in rate absolutely,
11 totally separate from any change in the Consumer Price Index.

12 It has nothing to do with it. That, as we understand
13 it, is what the statute provides in terms of small system
14 exemptions. It is only the CPI factor as its principal
15 impact in a surcharge that it is applicable to all systems
16 only in relation to bringing the amount of their payment to
17 copyright owners so it has not been eroded by inflation.

18 But the determination of the small system exemption
19 which I think is the point you are making is absolutely
20 separate and apart from monetary inflation. It is merely
21 to keep the level of that exemption whole the systems that
22 have raised their rates. It is complicated, but the Act is
23 complicated.

24 It does those two things. On the one hand to the
25 best of my knowledge for most small systems, the value of

etp7

1 of the small system exemption will increase. We will receive
2 lower payments from small systems, smaller cable systems.
3 Those that file form 1, form 2, then we would have if you
4 had not made any adjustment per the statute.

5 The adjustment you make in the ceiling is going
6 to reduce our payments from those systems. The only place
7 where we might make it up is in the surcharge to DSE paying
8 systems in accordance with the Act. Also, from those systems
9 which have grown to the extent by increasing the number of
10 subscribers and/or their rates so they move from a form 2
11 smaller system exemption level to a form 3 situation. That
12 is where you are instructed by the Act to maintain the
13 constant dollar value of the copyright payment to copyright
14 owners per DSE.

15 COMMISSIONER COULTER: Well, think about it seriously
16 the situation where you have raised the ceiling according to
17 the rate of the subscriber rate increase. That ceiling which
18 has to be used for the calculations according to the statute,
19 right?

20 THE WITNESS: That is correct.

21 COMMISSIONER COULTER: It is less than their actual
22 revenues?

23 THE WITNESS: Is less than their actual revenues.
24 How can that be, sir? If I multiply, if their rate remain
25 the same or the rate has increased, we are increasing the

1 statutory exemption level. That is according to the statute.

etp8
2 COMMISSIONER COULTER: That is on the assumption
3 the rate of increase in revenues is the same as the increase
4 in the rates?

5 THE WITNESS: We have increased the value of their
6 exemption by their increase in rates. That is what we have
7 seen in terms of protecting the value of the small station
8 exemption for small system exemption for smaller cable
9 systems. It is probably not fair because their systems as
10 you can see have gone into gross receipts levels that would
11 normally have made them a DSE paying system. Yet, they
12 remain a two or move back from a three to a two.

13 In terms of the Act, that is the only way we can
14 enter pretty fairly to all system.

15 You see, the basic thing I would like to make sure
16 you understand, Commissioner, is that on page 1 of this form,
17 the Section E, the block, the Section E things, there is ab-
18 solutely no reference to any adjustment, any uping because
19 of the CPI increase. That is separate and independent of
20 that.

21 CHAIRMAN BURG: Mr. Feldstein.

22 CROSS EXAMINATION

23 BY MR. FELDSTEIN:

24 Q I think that since we are on it, our minds are on
25 the forms, I will start with that and go back to the beginning

etp9

1 of Mr. Cooper's testimony.

2 Commissioner Coulter, I am going to ask similar
3 questions. I share your confusion on that. I am not sure
4 I understand it at this point. I can't think of what to ask
5 to elicit a clearer answer.

6 Looking at your form without any of the specifics
7 on it copyright Exhibit Rebuttal 8, you use a figure for
8 line 10. If there was no October 19, 1976, rate, you state
9 enter \$6.60. Am I correct in assuming that that \$6.60 is the
10 rate that came from Copyright Owner Exhibit 2 on direct?

11 A It is our figure that is very close to the figure
12 that we got and you got for first averages for all systems.

13 Q That is the figure you got from the Copyright
14 Royalty Tribunal form?

15 A Our system for form 3 was 6.605 to be exact.

16 Q That is your figure for the long form or form 3
17 systems? The \$6.60?

18 A Our analysis included only the long form system.

19 Q You are proposing to use this \$6.60 as an imputed
20 rate for all systems; is that correct?

21 A That is correct.

22 Q Are you familiar with NCTAs, the cable industry's
23 direct Exhibit No. 7?

24 A Yes, I am.

25 Q If you will recall, the forms for all systems were

etpl0

1 broken down; is that correct?

2 A They were.

3 Q The rates for all systems?

4 A They were.

5 Q Do you recall that the rate for smaller systems were
6 considerably less than the \$6.60?

7 A The rate you calculated was smaller, yes. As shown
8 in that chart.

9 Q For the smallest system a \$6.16 rate?

10 A That is what is shown in your chart 7.

11 Q Average the small and large there was an average
12 rate of \$6.48; is that correct?

13 A That is correct.

14 Q Both the \$6.16 and the \$6.48 are the smaller figures
15 for \$6.60 for long forms; is that correct?

16 A That is correct.

17 Q Would not a small system beginning service after
18 October of 1976 and forced to use an imputed \$6.60 rate be
19 disadvantaged?

20 A There are peculiarities with these figures. As you
21 know, we have said from the beginning that our analysis of your
22 survey was limited to the form 3 thing.

23 If I would recall and I would like to reference it
24 back the NCTA has published figures in connection with this
25 proceeding that show that the rates for small systems were, in

etpl1

1 fact, higher in 1976 than for large systems. There is a
2 document that was produced I believe, in the May filing to
3 that effect.

4 Q I believe that on our direct case, we relied and
5 stated we relied on the CRT basis of surveying systems. If
6 that is the case, and since you relied on the CRT as well,
7 the rate for small systems under the CRT formula according to
8 NCTA Exhibit 7 was \$6.16.

9 A \$6.60.

10 Q \$6.16?

11 A Excuse me. Right.

12 If that is the case, since when you fill out line
13 10, you have not gone down to block 3 to find out what
14 category you fit in, if you turn out to be a small system,
15 weren't you disadvantaged by using your larger imputed rates?

16 A In theory, you would be.

17 Q In actual practice? Why just in theory?

18 A I have no way of affirming this particular figure in
19 the NCTA material. I would question it. It seems to be
20 at variance with other data that I have seen including the
21 reversal on the same chart 7, Mr. Feldstein, the same one
22 to which you referred to me, your direct case in this
23 proceeding.

24 In the April 1980 figures the highest rate for any
25 system is the middle intermediate system. The rates for the

etpl2

1 larger cable systems and the smaller cable systems are lower
2 than your rate for the intermediate system.

3 Q I believe the October 1976 rates show it was
4 \$6.69 for DSEs, \$6.64 for the middle and \$6.16 for the smaller
5 systems. I have referred to the October '76 figures since
6 that is what you used to impute a 1976 rate?

7 A I did not use your figures. I used ours.

8 Q That is correct. But I am asking you since there
9 was no quarrel on the direct case with the figures that we
10 obtained from the Tribunal, if in fact, the October 1976 rate
11 for the smaller systems was \$6.16 is not the 44 cents dif-
12 ference significant in a small system in trying to determine
13 exactly what form category he is in?

14 A It could be, Mr. Feldstein.

15 COMMISSIONER JAMES: Out of curiosity, you mentioned
16 the \$6.48.

17 MR. FELDSTEIN: Yes.

18 COMMISSIONER JAMES: Was that a weighted average
19 or just a numerical?

20 MR. FELDSTEIN: It was a weighted average.

21 COMMISSIONER JAMES: Thank you.

22 COMMISSIONER GARCIA: Mr. Feldstein, I am a little
23 confused. In your line of questioning, are you saying if the
24 small system as 6.16 as of October 17, 1976, I don't understand
25 how he would be disadvantaged. That is the number he would use

as opposed to the 6.6.

etpl3

MR. FELDSTEIN: It is an imputed rate if it is a new system. If you have not gone up with inflation, you are disadvantaged under this methodology.

COMMISSIONER GARCIA: Would it be the other way around?

MR. FELDSTEIN: No. You would be disadvantaged. If my rates were imputed to be \$6.16 as of '76, rather than 6.60 and my present rates were seven, clearly the higher the imputed rate, the more the disadvantaged to me because I have not kept up with inflation by a lesser degree.

BY MR. FELDSTEIN:

Q Mr. Cooper, in your copyright Exhibit R9, you have worked several of the examples, all of the examples that Mr. Korn worked for us on direct examination; is that correct?

A That is correct.

Q In all of these cases, Mr. Cooper, the October '76 rate was \$6; is that correct?

A In all instances, yes.

Q You have four examples. One where the rate went down. One where the rate stayed the same and one where the rate went up some and one where the rate went up a lot. In 1976 with each of those systems paying or charging \$6 given a standard size and a standard number of DSEs, they would have

etpl4

1 paid under the fee schedule in the Act the same copyright
2 fee; is that correct?

3 A In 1976.

4 Q In 1979, let us say. That is before any decision is
5 this proceeding.

6 A Indeed.

7 Q System in similar circumstances charging the same
8 rate would pay the same fee?

9 A Regardless of what rate they charged.

10 Q Now in the absence of an adjustment heretofore,
11 let us assume that we had the \$6 rate these systems at
12 in size in 1976 that would have paid all the same rate had
13 they been paying in '76.. You have just said that.

14 A If their gross receipts were the same as now.

15 Q They must be same subscriber, DSEs and rates?

16 A Right.

17 Q They have changed their rates. Two have gone up.
18 Under the Act as presently written, would these systems
19 continue to pay the same royalty fee or would they be
20 differentiated?

21 A Under the Act before a CRT they would pay the same
22 that they pay in '76, '77, and '78 and '79.

23 Q Their gross receipts are the same. Their basic
24 subscriber rates have changed?

25 A If their gross receipts had increased, then, they

would be applying a higher royalty fee.

etp15

Q If two CATV systems starting off in 1976 had the same subscribers and same DSEs but different subscriber rates, would they have been paying different royalty fees?

A Yes, they would have.

Q Under your examples all four of these systems are now charging a different subscriber rate; is that correct?

A Yes, in the current one. The revised.

Q They have a revised basic rate to their subscribers. They are all different?

A That is correct.

Q Under your adjustment, all of these systems would pay the exact same subscriber fee; is that correct?

Q This is no matter what their rate experience?

A That is correct.

Q Mr. Cooper, you have started with systems with the same rate, thrown them in four different directions and brought them back to the same subscriber fee in Copyright Owners Rebuttal 9. What if those systems started with different rates and now were all charging the same rate?

A It would be a different set of configurations.

Q Yes. It would be. I have postulated on a sheet of paper here that CATV system was charging under your facts \$4 in 1976 and \$6 now because of the increase in their rate they would have no change in their royalty fee?

etpl6

1 A They would have no surcharge but not necessarily
2 no change in the royalty rate.

3 Q No change in their royalty rate because there would
4 be no surcharge?

5 A Assuming the number of subscribers remains constant.

6 Q I am stipulating that.

7 A Yes.

8 Q If the rate in 1976 were \$6 and it is still the
9 same under one of your examples, obviously, they have a sur-
10 charge. Their royalty rate goes up.

11 A Yes. The royalty fee goes up.

12 Q Well, you have made me change that before. Fees
13 are the total dollars they paid?

14 A Rates are like percentages.

15 Q Your rates in my \$6, then and \$6 now, the rates go
16 up?

17 A Mr. Feldstein, excuse me. I am referring to rates
18 in this stage in your hypotehtical as a statutory percentage
19 rate applied against gross.

20 Q In effect, are you not raising that when you put
21 a surcharge on it?

22 A In effect, it may be but what we are doing is
23 adjusting the copyright royalty fee.

24 Q Via adjusting the rate. If you are not adjusting
25 the rate you are not obeying the statute.

etp17

1 A It refers regardless of the specific language, and
2 I think the language may alter from place to place to maintain-
3 ing the constant level of payments to copyright owners.

4 Q Mr. Cooper, to bring you back to what the statute
5 says since you keep telling me, it states the rates established
6 by 111D2B which is where you find the schedule may be adjusted.
7 I presume you are trying to follow the statute in your
8 scheme?

9 A We are.

10 Q You are adjusting the rates for the hypothetical
11 systems?

12 A The proposal we have does not involve an alteration
13 of the statutory rates per DSE. The proposal that we are
14 making involves an adjustment in the fee calculated as a
15 result of the application of the statutory rates. But we
16 do not --

17 Q Does the Tribunal under the statutory section I
18 just read have the power to do that?

19 A It is up to the Tribunal to determine that.

20 Q You are recommending that they do that?

21 A We certainly are.

22 Q You had a subscriber a situation which does not
23 exists in '76 and now charge, as my hypothetical, a \$6 rate.
24 His rates or fees are up even more because he has an imputed
25 reduction since you assume a \$6.60; is that correct?

etpl8

1 A If his current rate is \$6 and he had no rate in
2 1976, then his surcharge would be higher than it would be for
3 a system that maintained the same rate in both periods.

4 Q Thus, we have here three hypotheticals. We have
5 a system with 5,000 subscribers, three DSEs. They all charge
6 \$6 today. They all pay different copyright fees under your
7 scheme; is that correct? That is what you have just said?

8 A Yes.

9 Q In your Copyright Exhibit R10, you made reference
10 to the Uhrichsville, Ohio system which under your scheme
11 ended up moving from its prior form 3 down to a form 2; is
12 that correct?

13 A That is correct.

14 Q The category in my mental calculator if it has not
15 gone dead, the increase in their average first set monthly
16 rate loss like it was 96 cents. That appears to me to be
17 less than the 40 percent inflation figure which copyright
18 owners have asked the Tribunal to adopt; is that correct?

19 A That is correct.

20 Q Yet, they move from form 3 to form 2 status?

21 A That is correct.

22 Q That is the anomaly that relates to the statute
23 which on the one hand says that we should use monetary
24 inflation to preserve the value of the small system exemption
25 which, in effect, reduces copyright royalty payments. The

etpl9

1 treatment of DSE paying systems where the statute refers to
2 adjusting increasing the fees paid by DSE systems to adjust
3 to the erosion of the value of the dollar in inflationary
4 times. There is a semiconflict there. That is what the
5 effect of this is. We are prepared as I indicated, recogniz-
6 ing that this could result in a reduction in copyright payment
7 by a large number of systems are willing to accept this
8 interpretation of the Act.

9 Q Mr. Cooper, may I suggest that your scheme creates
10 the anomaly. Whatever anomaly arguably might exists is
11 exasperated. In the case of Uhrichsville, you have a
12 system which went from \$5.50 in 1976 to \$6.46 today. It was
13 rewarded by virtue of its position in its dollars with paying
14 less copyright in 1960 than it would in 1976, despite the
15 fact it fails to keep up with inflation.

16 However, if a hypothetical system charged \$6.46 in
17 1976 and \$6.46 now, the same as your Uhrichsville, they would
18 be a form 3 system under your scheme.

19 A It depends on the number of subscribers they have.

20 Q I assume the same?

21 A You are assuming 4395 in both periods.

22 Q Yes.

23 A That is probably so. Its gross receipts then would
24 be as the gross receipts we are dealing with here. You are
25 saying \$6.46 in October '76. The reason for that is that

etp20

1 the application of the small system exemption would not apply
2 to this system. The system would not have been entitled to
3 the same small system exemption in '76, and therefore is not
4 entitled to the small system exemption in 1980-81.

5 Q You are left with the anomaly of two systems identi-
6 cal to each other 30 miles down the road having the same
7 revenues, subscribers and DSEs and a markedly different
8 copyright payment; is that correct, under your scheme?

9 A Under our scheme, it is possible that peculiarities
10 of that nature could occur because of the bifurcation of the
11 Act which on the one hand says protect the small system
12 exemption from being eroded by inflation and on the other
13 hand it says increase the payments made by large systems to
14 prevent the erosion of copyright payments to coyright holders.

15 I think it is an anomaly. You may be dealing at
16 margin. Anomalies at the margin are also showing themselves
17 up. For example, here we are dealing with this system
18 based on a real live example. Its qualification for a form 2
19 payment is \$7,000 below the \$188,000 ceiling. That is
20 essentially at margin. But it is a good point and it is
21 correct that such a thing could occur.

22 MR. FELDSTEIN: Let the record show that that was
23 an affirmative answer.

24 THE WITNESS: It was.

25 BY MR. FELDSTEIN:

etp21

1 Q You have postulated a scheme with a rather mechanical
2 application which is to say the Tribunal publishes a number.
3 The CATV system jots down the subscriber, his revenues and
4 his rate and then applies it pursuant to your formulation.
5 You have admitted or at least your counsel admitted, that
6 regulatory restraint can be a relevant factor. If that is
7 so, what if your hypothetical system in the middle of 1982
8 shows no increase in rates? The reason he is not increasing
9 rates is that the City Council has flatly turned him down
10 three times in a row.

11 You help him up by your formulation for substantial
12 increase in copyright. What has happened to the regulatory
13 restraint possibility that he had to ameliorate this? Have
14 you read it out?

15 A No. I am listening. There are two things. First,
16 there is very little evidence that regulated cable systems
17 asking important rate increases don't get them.

18 Q I asked you a hypothetical.

19 A I am moving into trying to understand the hypothetical.
20 The second part I am troubled by something I said earlier.
21 The extent to which the gross receipts of the system have been
22 kept low because they did not have the benefit of the rate
23 increase results in lower copyright payments which is a burden
24 borne by the copyright owners.

25 Q Isn't that made up by the fact there is going to be

1 an adjustment in the copyright rates and they are going to
2 end up paying as much as before?

3 A No. I am not saying it would come out that way
4 at all.

5 Q You had systems here which would be \$6.

6 A There would be a penalty to the extent they did
7 not keep up with inflation. I don't know. You say all would
8 be made up by the surcharge. I don't know.

9 Q But you have just stated you would share the burden.

10 A Exactly so.

11 Q You have also stated that perhaps, or I have stated,
12 and you have said you don't know that the surcharge might
13 well make up for that short fall?

14 A No. When we say sharing the burden in dealing with
15 cable copyright the results of an increase in 99 cents to the
16 cable system and one cent to us, I think that is a burden
17 sharing that we are talking.

18 We are not talking about equal burdens shared. We
19 are not talking about equal burdens sharing coming out and
20 I don't think we have to talk about equal burden sharing com-
21 ing in.

22 Q I did not ask about that. You stated on the record
23 in answer to your counsel's question that regulatory delay
24 really did not make much difference because the cable system
25 didn't have the pay as much copyright since he had lesser

etp23

1 revenues?

2 A Right.

3 Q So, he was hurt because he did not get his gross
4 revenues. You were hurt because you did not get the extra
5 money which you would have gotten for copyright?

6 A Right.

7 Q I am asking you don't your scheme insure the
8 burden is borne by one party, the cable operator? If he
9 fails to get his rate increase, you will lay a surcharge on
10 him insuring that you get your money? Thus, the cable
11 operator looks twice?

12 A No. The surcharge is only on his gross receipts
13 less the increase.

14 Q Mr. Cooper, I would remind you in your R10
15 examples, you had it figured out so that a cable system which
16 failed to raise its rates and thus had lower gross revenues
17 still paid as much money into the copyright pot as the CATV
18 system who had raised its rates?

19 A That is correct.

20 Q Since you got \$4,117 and change from each of those
21 four systems, where could you possibly be hurting in that
22 scheme?

23 A We are hurting to the extent if one, we postulate,
24 for example, same cable systems were at the \$9 rate. If they
25 were all there, the gross receipts would have been higher and

1 our copyright royalties would have been higher.

2 Q That is not the example I have asked. I am asking
3 the example you included. The CATV system that did not raise
4 its rate much or at all. Under your example, do you still
5 get the same dollars out of many as you would have had you
6 succeeded in raising the rates?

7 A At these levels, the answer is yes.

8 Q In that case, they are not bearing a burden of the
9 failure of the cable operator to get a rate increase?

10 A On the other hand, if he had grown --

11 Q I am asking you a question based on a hypothetical.

12 A The answer on the hypothetical is correct, Mr.
13 Feldstein.

14 Q If this cable operator was unable to raise his rate
15 not because of business reasons which the cable history never
16 denied are present in many of these decisions because he
17 was stopped cold by a rate regulating authority, does your
18 scheme allow the taking of that into consideration?

19 A If he were stopped cold. It says that -- I think
20 there we are placing the interpretation totally on the
21 statute. We say okay. We are both in business. We are
22 here to get our value of the copyright dollar that you would
23 have paid us if inflation had not been a factor.

24 Q Mr. Cooper, doesn't the statute say regulatory
25 restraint is an extenuating factor under the statute?

1 A Yes. We certainly agree with that. As I indicated
2 we recognize that CRT recognizes that that was one of the
3 factors in its questionnaire and we recognize it by tabulating
4 the material from the CRT questionnaire.

5 Q You have a five-year period under your scheme with
6 semiannual adjustments which means 10 adjustments; is that
7 correct?

8 A Where, when and to whom as a cable system which is
9 stopped under regulatory restraint smack in the middle of
10 that period, go for a redress of its grievances?

11 A I presume there are administrative or judicial
12 review procedures.

13 Q At the Copyright Office?

14 A I don't believe this would be under jurisdiction,
15 of the Copyright Office.

16 Q At the Copyright Royalty Tribunal?

17 A I believe it would fall more within the province
18 of the CRT.

19 Q How many cable systems are there, Mr. Cooper?

20 A In excess of 4,000.

21 Q With 4,000 cable systems and 10 adjustment periods,
22 40,000 possibilities for some kind of an appeal to the
23 Tribunal on regulatory restraint, what do you think that
24 would do to the caseload of the Tribunal?

25 MR. ATTAWAY: I have to object to this line of

etp26 1 questioning. Mr. Feldstein is posing hypotheticals that
2 I don't think the witness can possibly answer. If he has
3 had an opportunity to present witnesses to demonstrate that
4 even one system has clearly experienced regulatory restraint
5 and we have not seen that yet and now this witness is
6 supposed to hypothesize 4,000 systems experiencing regulatory
7 restraining.

8 MR. FELDSTEIN: I will rephrase the question.

9 BY MR. FELDSTEIN:

10 Q NCTA has presented data based on surveys and
11 concrete examples, a number of which involving regulatory
12 restraint of one kind or another through three industry
13 witnesses.

14 I would submit that based on that slice of life, the
15 cable industry, there have been a number of instances of
16 regulatory restraint. If there are any instances of regulatory
17 restraint among the 4,000 systems in the 10 adjustment periods,
18 would you then expect them to bring their plight to the
19 Tribunal?

20 A If the Tribunal invites them to do so. The Tribunal,
21 I believe, has the authority in connection with the statute
22 as far as my reading is concerned to say we consider extenuat-
23 ing factors. We have decided that rate regulation is not
24 a material factor at this time. I believe that is within
25 their province.

etp27

1 Q Mr. Cooper, the statute also states that the Tribunal
2 can consider all other factors unlisted, unnamed. It states
3 they can consider all other factors.

4 Do you believe that cable systems who had a case
5 to make on what they consider to be a valid factor in the
6 middle of all of this could also bring this to the Tribunal?

7 A I believe that any cable system or any organization
8 that has business with the Tribunal can make a presentation
9 to the Tribunal.

10 MR. ATTAWAY: Excuse me. Madam Chairman, I think
11 counsel is calling for a conclusion of law.

12 MR. FELDSTEIN: May I ask what you called for in
13 your examination of this witness?

14 CHAIRMAN BURG: Is that an objection, Mr. Attaway?

15 MR. ATTAWAY: Yes.

16 CHAIRMAN BURG: I will overrule the objection.

17 BY MR. FELDSTEIN:

18 Q Do you believe that other factors could be relevant
19 both now and in the future to the Tribunal's considerations?

20 A Yes. I do.

21 Q Mr. Cooper, your form which contains a number of
22 calculations and alterations to the present copyright
23 contains I would submit especially when you have a math
24 brain like mine when you add calculations you add to the
25 possibility of error. The copyright holders have presented

etp28

1 evidence, the latest being through Mr. Sampson, and once again
2 pointing out the Warner Amex system that cable systems do not
3 always correctly fill out their copyright forms; is that
4 correct?

5 A That is certainly true.

6 Q Mr. Sampson has stated that the Copyright Office
7 attempt s to check over for calculations; is that correct?

8 They attempt to check forms when they come in to
9 see that the basic calcualtions are done correct?

10 A Whatever manipulations there are with the data on
11 the form are done correctly.

12 Q And he stated although he would not answer the
13 question of how much error, was not allowed to answer
14 questions of that sort, there are cases of error from time
15 to time?

16 A We know, those of us who have spent time with
17 thousands of forms, know that that is the case.

18 Q Don't you believe that the addition of another set
19 of complications --

20 A Computations.

21 Q Excuse me. Freudian slip.

22 Another set of computations would add in some
23 quantity to the number of errors that are made in copyright
24 forms?

25 A I think that any calculations that are added or that

etp 29 1 exist now are subject to error by people filling out the forms.
2 I don't think the calculations we are asking for suggesting
3 that the new calculations are at all complex. And we are
4 willing to trade them off for maybe a thousand computations
5 that are now necessary to make in the form that are of no
6 use to us or this proceeding.

7 Q Mr. Cooper, could a 12 year old fill this out?

8 A Yes.

9 Q Well, you have met the IRS' standard and they still
10 make mistakes.

11 Mr. Cooper, you have a reference. The possibility
12 of simply filing these forms and cutting out a lot of
13 information. In theory, music to the heart of cable operators,
14 I am certain. One of the things you referred to, I believe,
15 was logging parttime substituted carriage. Did I miss
16 you on that?

17 A No. Part-time and substitute carriage. There are
18 two separate areas of the form to be filled out by the form 1,
19 2, and 3 systems.

20 Q Admitted.

21 A Yes.

22 Q In the case of a form 3 system, would you excuse
23 many from filling those out?

24 A Yes. I assume concurrently that the unfortunate
25 change in regulations proposed by the FCC goes into effect.

etp30

1 Under the proposed changes by the FCC, the principal reason
2 for substitute carriage which is syndicated exclusivity dis-
3 appears and under the FCC regulation or the recision
4 of the distant signal, the reason for part-time carriage
5 disappears. Excuse me. That is the answer to that.

6 Q Mr. Cooper, why do you believe that the part-time
7 and substituted programming information is required on
8 the form 3?

9 A Why is it required?

10 Q Yes.

11 A On form 3?

12 Q Why is it required?

13 A It is required to determine for copyright owners
14 who wish to check compliance with the statutory regulations
15 with respect to payment for distant signals and whether
16 or not these exceptions which are frequently cherry picking
17 are actually required by syndicated exclusivity requirements.

18 Q Mr. Cooper, I would suggest that the Copyright
19 Act mandates long form cable systems to pay for some of this
20 programming. Do you recollect that?

21 A I think the only areas would be in the carriage
22 of substituted life support programs.

23 MR. ATTAWAY: Point of inquiry. May I ask counsel
24 what this line of questioning has to do with this proceeding?

25 CHAIRMAN BURG: Ask him.

etp31

1 MR. FELDSTEIN: I am not sure what the testimony
2 of your witness had to do with this proceeding. I am
3 cross-examining him on his testimony. He testified he
4 wanted to remove all of this information from the form 3.
5 The way I read the way form 3s have been filled out a sub-
6 stantial amount of the business he wants to eliminate we
7 have to pay copyright on.

8 If he is proposing we no longer have to pay
9 copyright on it, that is interesting news.

10 THE WITNESS: Those of us who have looked at the
11 forms, have suffered with them, would say the amount of copy-
12 right paid by all the systems in the country for substitute
13 programming for which copyright payments are required under
14 the Act amounts to less than even my salary in a year and
15 probably less than the amount my unemployed daughter gets from
16 unemployment insurance.

17 BY MR. FELDSTEIN:

18 Q Mr. Cooper, does the Act have payments for this?

19 A Yes.

20 Q Can you abrogate that section of the Act?

21 A No.

22 Q Do you believe you would have to go to Congress
23 for a change in that?

24 A No. I would revise the Act to require cable systems
25 to require part-time programming or substitute programming

1 for those additional fees which are required to be paid. From
2 our review of statements of account that is probably one-
3 tenth of one percent of the entries that are in the statements,
4 of account with relationship to part-time and substitute
5 programming.

6 MR. ATTAWAY: Did you mean revise the Act or the
7 Copyright Office form?

8 THE WITNESS: The form. The Act does not have to
9 be revised to accommodate. That is just extraneous and
10 useless information.

11 BY MR. FELDSTEIN:

12 Q You stated you felt the Copyright Office would not
13 have any new burden of work?

14 A Yes, sir.

15 Q In light of Mr. Sampson's testimony and the practice
16 of the Copyright Office, why do you believe that they would
17 not have to check the new calculations which you would put
18 on the forms?

19 A They would have to check the new calculations.

20 Q Thus, they would have some more work to do.

21 A I think it would be a substitution of work. I
22 think the net amount of work that the Copyright Office would
23 be required to do would be unchanged from what it is now
24 or diminished by changes in the form.

25 Q Mr. Cooper, there is a calculation of page 1 of

1 your form to be made before you ever decide which form to
2 fill out?

3 A Right.

4 Q It is a calculation which does not need to be made
5 today?

6 A Yes. The calculation needs to be made today. Still
7 no cable system can go up and say --

8 Q I am talking about the Copyright Office. When a
9 cable system files a form 1 and he puts down his gross
10 revenues as \$35,000, that is accepted by the Copyright
11 Office as a form 1 with \$35,000?

12 A That is true.

13 Q Would they not have to check your new calculation
14 to see that it was done properly?

15 A They would have to do that multiplication.

16 CHAIRMAN BURG: Mr. Feldstein, I think give the
17 hour, I am going to adjourn today's meeting. We will
18 reconvene at 10 o'clock tomorrow morning in this room.

19 Thank you.

20 (All exhibits identified were
21 received into evidence.)

22 (Whereupon, the hearing was
23 adjourned to reconvene at
24 10 o'clock a.m., Thursday,
25 November 13, 1980.)

ERFATA SHEET

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